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intention not to interfere with it, cannot, on the demolition of the house by the possessor, and in the absence of any proof of his having used the materials, recover from him the value of the house. *Anselm* v *Brashear*, 403.

ACT, AUTHENTIC.

1. Three witnesses are necessary, to render authentic an act executed before a notary by a blind man. C. C. 2231. *Union Bank* v. *Morgan*, 418.

2. Acts *sous seing privé* can only be made authentic by a recognitive act setting forth their tenor, executed before a notary and two witnesses. *Chambliss* v. *Atchison*, 488.

ACT SOUS SEING PRIVE.

A power of attorney executed before a notary in the presence of two witnesses, by a blind person, though not an authentic act, is admissable in evidence as an act *sous seing privé*, on proof of the signature by one of the subscribing witnesses, corroborated by circumstances. C. C. 1775, 2231, 2232. *Union Bank* v. *Morgan*, 418.

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No amicable demand is required where the action is against an absentee. In such case it is impractible. *Millaudon* v. *Beazley*, 916.

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I. *Will lie When.*

1. Where by the release of one of two debtors *in solido*, and the deduction of his part of the debt, made in the court below for the purpose of introducing him as a witness, the amount in dispute is reduced below the sum necessary to give jurisdiction to the Supreme Court, no appeal will lie. Const. art. 63. *Gardère* v. *Garvey*, 136.

2. Where the amount in dispute is insufficient to give jurisdiction to the Supreme Court, the appeal will be dismissed, though the objection be not made by either party. *Ib.*

3. Where a party takes no bill of exceptions to an order of the court refusing an application made by him, but proceeds to trial without any objection in that respect, it is a tacit acquiescence in the order, and will preclude him from contesting its correctness on appeal. *Cooper* v. *Polk*, 158.

4. An appeal will lie though the judgment be for less than three hundred dollars, where the amount claimed exceeds that sum. Const. art. 63. *McKee* v. *Ellis*, 163.

5. An intervenor may appeal from a judgment though his claim be for less than three hundred dollars, where the amount claimed by the plaintiff exceeds that sum. *Colt* v. *O'Callaghan*, 189.

6. A party who resides out of the State may appeal at any time within two years from the date of the judgment. *Scott* v. *Rusk*, 266.

7. Where, on appeal from an order refusing to set aside a provisional seizure, the question of releasing the property is the sole matter for consideration, and the record contains no information as to the value of the property, the appeal will be dismissed, though the action was on a claim exceeding three hundred dollars. Const. art. 63. *Plique* v. *Bellomé*.

8. No appeal will lie from an order dissolving an injunction, on the execution of a bond by defendants in compliance with art. 307 of the Code of Practice, where the facts of the case show that the dissolution can work no irreparable injury to the plaintiff. *Jure* v. *First Municipality*, 321.

9. Where the amount in contest, in a rule taken on the sheriff to show cause why he should not be made liable for the balance due on a *fi. fa.*, of which no return was made, is less than three hundred dollars,

no appeal will lie; and where, in such a case, an appeal has been taken, it will be disregarded by the court, though no objection on the ground of want of jurisdiction be made by either party. *Webb* v. *Kemp*, 337.

10. An appeal will lie from an order of a judge rendering a judgment of another State executory, though not made in court. *Bank of Tennessee* v. *McKee*, 461.

11. A party who had obtained an order allowing him an appeal, on discovering that several defendants had not been made parties, presented a second petition, and obtained a second order of appeal, embracing all the parties. A transcript having been sent up under each order, by an agreement of counsel the first appeal was dismissed. *Held*, that the court below was not divested of jurisdiction by the first order of appeal, it having been irregularly obtained; and that the second appeal cannot be dismissed on the ground that a previous appeal had been abandoned. *Bates* v. *Weathersby*, 484.

12. The inability or omission of a party to furnish a bond and fulfill the condition precedent upon which a suspensive appeal was granted, will not preclude him from applying within the year for a devolutive appeal, on the ground of his having abandoned a previous appeal. The jurisdiction of the Supreme Court attaches only when the bond is filed. *Gibson* v. *Selby*, 628.

13. No appeal will lie from a judgment on a claim for three hundred dollars with interest from judicial demand. Const. art. 63. The amount due at the institution of the suit constitutes the matter in dispute. *Mason* v. *Oglesby*, 793. *Frellsen* v. *Copley*, 911.

14. An appeal will lie though the amount of the note sued on be under three hundred dollars, where the defendant having set up the invalidity of a contract of which the note sued on was a part, the amount thus involved in the controversy exceeds three hundred dollars. *Williams* v. *Vance*, 908.

15. No appeal will lie from an interlocutory judgment which can cause no irreparable injury to the party who deems himself aggrieved. *Succession of White*, 964.

16. Where several judgment creditors, each of whose claims is under three hundred dollars, but whose aggregate claims exceed that sum, unite in a petition of intervention in an action between their debtor and a third person claiming a privilege in virtue of separate seizures made by them under execution, an appeal taken by them will not be dismissed on the ground that their claims do not severally amount to three hundred dollars. *Colt* v. *O'Callaghan*.

II. *Allowance of Appeal.*

17. A judge is not incompetent to grant an order of appeal in consequence of being a party to the case. A recusation could alone render him incompetent. *Gibson* v. *Selby*, 628.

18. Where a judge is unwilling to act on an application for an appeal from a judgment rendered against him personally, he should recuse himself; and the recusation should be in writing to enable the judge of an adjoining district to act in his place. *Ib.*

19. Consent of parties cannot dispense with the necessity of an order allowing an appeal. *Per Curiam:* The jurisdiction of the appellate court attaches only after a judicial order, divesting, when its terms are complied with, the jurisdiction of the inferior tribunal. *Ib.*

20. Where the record shows no petition or motion for an appeal, nor any order of appeal, the appeal must be dismissed on a motion to that effect. *Rivette* v. *Bergeron*, 752.

21. An appeal must be dismissed where the appellant had not obtained an order authorising him to appeal. *Livingston* v. *White*, 902.

III. *Where Returnable.*

22. An appeal from the Probate Court of the parish of Madison, allowed in November, 1845, was properly made returnable to the Supreme Court at Alexandria. The 149th art. of the constitution, which provides that appeals from that parish shall be returned to New Orleans, was inoperative until the constitution was proclaimed, on the 2d of December of that year. Const. art. 150. *Succesion of Montgomery*, 469.

IV. *Parties.*

23. A sheriff, though made defendant with the parties by whom a *fi. fa.* had been taken out, in an action to enjoin the execution, need not be made a party to an appeal taken by the plaintiffs in execution from a judgment perpetuating the injunction, where the judgment is not attempted to be amended to his prejudice. *Hobgood* v. *Brown*, 323.

24. The Supreme Court may make new parties in cases pending on appeal, whenever it becomes necessary to do so, from the death, insolvency, or bankruptcy of a party, or in consequence of the forfeiture of its charter by a litigant corporation. The power to do so is indispensable to the exercise of its appellate jurisdiction, and is not prohibited by art. 63 of the constitution, which declares that the jurisdiction shall be appellate only. When, in the exercise of this power, a contest arises as to facts, the as-

certaining of which is indispensable to the action of the court, the issue should be sent down to be tried by the court of the first instance; but when the question is one of law, it would be idle to remand the case. *Planters Bank* v. *Bass*, 430.

25. On an appeal from a judgment on an opposition to a tableau of distribution presented by the curator of a succession, absent creditors who never appeared in the court below, nor ever claimed to be acknowledged as creditors, and who were placed on the tableau by the curator for the protection of his own interest as a surety of the deceased, need not be made appellees, though their claims were opposed by the appellants. It is enough that the curator, who is the real appellee, be cited. *Succession of Montgomery*, 469.

26. Where one of the defendants in an action for the partition of a succession dies while the case is pending in the court of the first instance, and it is afterwards decided without his heirs having been made parties, the appeal will not be dismissed, but the case will be remanded, that the heirs may be made parties to the action. C. P. 120. *Bates* v. *Weathersby*, 484.

27. Arts. 592, 888, of the Code of Practice, which authorise an appellee, though he had not appealed from the judgment of the lower court, to pray that it may be reversed on those points in which he believes that he has been aggrieved, apply only where all the parties have been cited on the appeal, and all the issues tried in the first instance are appealed from. *Girod* v. *Creditors*, 546.

28. In the general administration of the effects of an insolvent, the syndic represents the creditors, but in the *concurso* they act in their own names. The decision upon each claim is a separate judgment, belonging to the party in whose favor it is rendered, which cannot be disturbed on appeal unless that party be cited. The syndic may appeal from the judgment rendered upon any one claim, and litigate it with the holder; if he does not, any creditor may; but if neither appeal, there can be no adjudication upon their rights in the Supreme Court. *Ib.*

29. Parties claiming as creditors or heirs must prove in the lower court that they are such, or they will not be heard as appellants from a judgment relative to the succession. *Livingston* v. *White*, 902.

30. One who made no appearance before judgment, and raised no issue in the court below, and against whom the judgment cannot have the force of *res judicata*, has no right to appeal therefrom. *Sue* v. *Viola*, 986.

See MARRIAGE, 57, 58. SURETY 4.

V. *Bond and Surety.*

31. An appeal will not be dismissed on the ground that the appeal bond is not payable to the appellee, where the name of the person in whose favor it was actually made was inserted through a clerical error. Such an error will not discharge the surety. *Morris* v. *Covington*, 259.

32. Where a plaintiff, who had obtained judgment against the defendant, appeals from a judgment in favor of an intervenor, but executes an appeal bond in favor of the defendant, the appeal must be dismissed. An affidavit that the failure to make the bond payable to the appellee was an error committed by the clerk in preparing the bond, will not entitle the appellant to relief. In such a case the clerk acts as agent of the party, and no relief can be given against his errors or omissions. *Hill* v. *Bowden*, 451.

33. An appeal from a judgment rendered in an action instituted by plaintiffs for the use of third persons, will not be dismissed because the appeal bond was made payable, and the citation of appeal directed, to the plaintiffs, simply, without mentioning those for whose use the suit was instituted. *Bank of Tennessee* v. *McKee*, 461.

34. An appeal will not be dismissed where the bond, though insufficient for a suspensive, is large enough for a devolutive, appeal. *Balph* v. *Hoggatt*, 462. *Lewis* v. *Splane*, 754.

35. Where, in the settlement of a succession, two distinct judgments have been rendered, one upon a statement of debts filed by an administrator, and the other upon an account of his administration, and the application for appeal is from the judgment upon the statement of debts, but the bond is given as for an appeal from that upon the account, the appeal must be dismissed. *Livingston* v. *White*, 902.

36. It is no part of the duty of a clerk to prepare an appeal bond, so as to bring any irregularity in its execution within the 19th section of the stat. of 20 March, 1839, authorising the Supreme Court, in certain cases, to grant time for the correction of errors or irregularities. *Ib.*

37. An appeal must be dismissed where the real party in interest is not included among those to whom the appeal bond is made payable. *Brigham* v. *Taylor*, 906.

38. Where an appellant abandons his appeal, the surety on the appeal bond cannot exempt himself from responsibility on the ground that "the judgment adpealed from has not been affirmed," as contemplated by sec. 20 of the stat. of 20 March, 1839, and arts. 575, 596 of the Code of Practice. *Per Curiam:* The condition of the appeal bond, following litterally the requisition of art.

579 of the Code of Practice was, "that the appellant shall prosecute his appeal, and shall satisfy whatever judgment may be rendered against him, &c." The appellant did not prosecute his appeal, and the condition of the bond was thus broken. *Champomier* v. *Washington*, 1013.

30. The surety on an appeal bond is not bound until a *fi. fa.* has been duly issued against the principal, and returned unsatisfied. *Ib.*

VI. *Citation of Appellee.*

40. Where an appeal is granted on motion, in open court, no citation is necessary. *Isabella* v. *Pecot*, 387.

41. Where an appeal taken from a judgment homologating a tableau of distribution filed by the syndic of an insolvent estate was not granted in upen court, none but the parties cited will be presumed to have had notice of it. *Girod* v. *Creditors*, 546.

42. An appellee cannot require an appeal to be dismissed on the ground that he has not been cited. It is the duty of the clerk to issue, and of the sheriff to serve, the citation; and their neglect of duty cannot deprive a party of the right to be heard on appeal. In such a case further time will be allowed to cite the appellee. Stat. 20 of March, 1839, s. 19. *Broussard* v. *Broussard*, 769.

See 33, *supra*.

VII. *Record.*

43. Where the record does not contain all the evidence on which the case was tried, and there is no statement of facts, bill of exceptions, nor assignment of error filed within the time prescribed by art. 897 of the Code of Practice, the appeal must be dismissed. *Byrne* v. *Riddell*, 11. *Hampson* v. *Reynaud*, 996.

44. The omission of a seal in the copy of a citation in the record of appeal will not be considered as establishing that the citation was issued without a seal, it being a common practice with clerks not to copy the seal, in making a copy of the citation. *Medley* v. *Voris*, 140.

45. Where the transcript of an appeal is not filed within three days after the return, and the failure does not result from any act or neglect of the clerk or other officer, the appeal must be dismissed. Such a case is not embraced by the act of 20 March, 1839, s. 49. *Davis* v. *Hood*, 453.

46. To relieve an appellant from the consequences of his omission to file the record of appeal in time, on the ground that it was not filed through the mistake or misconduct of the clerk, a strong and clear case must be made out. The testimony of the counsel for the appellant that he was under the impression that the record had been filed, and that he had given to the clerk the name of a person, as surety for the costs, with whom the clerk was satisfied, in the absence of any proof of the waiver by the clerk of a written bond for the costs, is not sufficient proof of a compliance by the appellant with the rule of court as to security for costs, or of a violation of duty on the part of the clerk in omitting to file the appeal. *Champomier* v. *Washington*, 723.

47. Where the transcript was not filed at the time when the appeal was made returnable, and no application was made to extend the time, the appeal must be dismissed. *Guilbeau* v. *Creditors*, 769.

48. An appellant who desires to have his case examined on the merits, must bring up a sufficient statement of the evidence on which it was tried. If he fail to do so, he cannot take advantage of his own omission. *Lemée* v. *Bosley*, 802.

49. Where the parties to an action consent that the testimony taken on the trial shall be reduced to writing by the judge in a certain manner, to serve as a statement of facts in case of appeal, and the mode adopted is as well calculated to secure a fair and accurate statement of the evidence as if the testimony had been taken down by the clerk, neither party can object to it after appeal. *Lynch* v. *Crain*, 905.

50. Where there is nothing in the record to show that the amount in dispute exceeds three hundred dollars, the appeal must be dismissed. *McDonogh* v. *Derbigny*, 956.

51. A certificate of the clerk of the Supreme Court that the transcript of a record has not been "brought up" within the time fixed, is equivalent to a certificate that the transcript had not been "filed" within that time, and is sufficient to authorise the issuing of an execution. *Champomier* v. *Washington*, 1013.

52. It is not sufficient to entitle an appellee to execution, to file in the clerk's office of the court of the first instance a certificate of the clerk of the Supreme Court that the record was not filed in time; the certificate must be produced before the lower court, and an order of execution obtained. C. P. 589. *Ib.*

VIII. *Assignment of Error.*

53. Where the record shows that the judgment of the lower court was rendered on an exception to the petition, on the ground of the insufficiency of the allegations to authorise the issuing of the injunction prayed for, and that the exception was overruled, the judgment may be examined

on appeal without any formal assignment of errors. *Per Curiam:* This is not such a case as is contemplated by art. 897 of the Code of Practice. *Wood* v. *Henderson*, 220.

IX. *Motion to Dismiss.*

54. A motion to dismiss on the ground of informalities in the mode of bringing up an appeal, must be made within three days after the record is filed. *O'Reily* v. *McLeod*, 138.

55. An appeal will be dismissed only where the appellee shows himself clearly entitled to that relief. In case of doubt, the interpretation will be liberal in favor of the appellant. *Isabella* v. *Pecot*, 387.

56. An irregularity in the mode of bringing up an appeal, not mentioned among the grounds set forth in a motion to dismiss, will not be noticed. *Ib.*

X. *Judgment on Appeal.*

57. An error in allowing interest from the 1st instead of the 4th of the month, on a sum of seven hundred dollars, is too insignificant to justify the reversal of a judgment. *Medley* v. *Voris*, 140.

58. Where the facts of the case leave it doubtful whether the court should interfere with a judgment, overruling a motion to set aside an order directing certain interrogatories to be taken for confessed, the party against whom they have been taken for confessed will be considered as entitled to the benefit of the doubt, and the case will be remanded to give him an opportunity of answering the interrogatories. *Miller* v. *Allison*, 308.

59. Where the pleadings and evidence are too incomplete to enable the court to pronounce a final judgment, the case may be remanded, with leave to the parties to amend. *Birdsall* v. *Bemiss*, 449.

60. In appeals from decisions of justices of the peace, in cases involving the constitutionality or legality of a municipal ordinance imposing any tax or impost, the power of the court is limited to the question of the constitutionality or legality of the ordinance. Constitution, art. 63. *First Municipality* v. *Pease*, 538.

61. The fact that a party was erroneously condemned by the court of the first instance to pay half the costs of the action, will not authorise a reversal of the judgment on appeal, where no application was made to the court below to correct the error. *Amis* v. *Merchants Insurance Co.* 594.

62. A judgment will not be reversed, and the appellee amerced in costs, for an error in calculation, to the prejudice of the appellant, of about eight dollars, where no application was made for a new trial in order to correct the error, *Angelloz* v. *Rivollet*, 651.

63. A clerical error in the name of a plaintiff, in whose favor judgment was rendered in an inferior court, may be corrected on appeal. *Weathersby* v. *Huddleston*, 845.

64. Where a judgment against parties cited in warranty, improperly allows interest on the price paid by the parties evicted from judicial demand, instead of giving it from the date of judgment, but the warrantors have not asked for the correction of the judgment, either in the inferior or Supreme Court, it will be affirmed as rendered. *Tear* v. *Chambers*, 870.

65. Where the ends of justice require it, the court will remand a cause, with leave to the plaintiff to amend his pleadings. *Oliver* v. *Simmes*, 882.

66. Where an act of sale is offered in evidence by a party to prove the fact of the payment of the price of the thing purchased, but is admitted by the judge only to prove *rem ipsam*, and the party offering it neither excepted to the decision of the court in restricting its effect as evidence, nor in any way reserved the point, the correctness of the decision in restricting the effect of the evidence cannot be examined on appeal. *Cochran* v. *Dewees*, 960.

67. Where a case is decided on a point suggested for the first time in a printed argument, filed after the case had been argued and submitted, and never communicated to the opposite party, the latter will be relieved from the effects of the surprise; and where a certified copy of an order made by the court below, annexed to the application for a re-hearing, shows that the ground on which the case was decided had no existence in fact, the additional extract from the minutes will be received as if brought up on a *certiorari*, and the case be decided at once. *Champomier* v. *Washington—Rehearing*, 1014.

See COURTS, III. APPEAL, 5.

ARBITRATION.

An agreement between the parties to a suit to submit the matters in dispute to amicable compounders is a contract, and the parties should be held to the observance of the strictest good faith in all proceedings relating thereto. *Driggs* v. *Morgan*, 151.

ARREST.

Where an agent residing in this State, purchases a bill endorsed in blank, for a non-resident principal, which is afterwards protested for non-payment, and no discharge

has been given by the principal to the agent from any responsibility growing out of the transaction, the latter may consider himself as a creditor of the party from whom he purchased the bill. The provision of the ninth sec. of the stat. of 28 March, 1840, that no citizen of another State shall be hereafter arrested at the suit of a non-resident creditor, except where the debtor has absconded from his residence, does not apply to the arrest of a debtor, made by the purchaser of a bill under such circumstances. *Per Curiam:* He has such an interest in the bill as will entitle him to exercise all the rights of a *bonâ fide* litigant creditor. *Conrey* v. *Elbert*, 18.

ASSIGNMENT OF ERROR.

See Appeal, VIII. Criminal Law, 18.

ATTACHMENT.

See Sheriff, 7, 9, 11.

I. *Will lie When.*

1. In an action for the settlement of a partnership plaintiff cannot proceed by attachment, where, from the nature of the business, it is impossible that he can swear, with certainty, to the amount which will be found due to him on a final settlement. *Per Curiam:* We do not, however, wish to be considered as deciding that a partner can, in no case of joint adventure, proceed by attachment. Cases may occur where the business of the adventure is so limited and simple, that a party may be considered as able to swear to a positive and precise balance. *Brinegar* v. *Griffin*, 154. *Johnson* v. *Short*, 277.

2. Rights acquired by third persons subsequently to an attachment, cannot affect the rights of the attaching creditor. *Murray* v. *Gibson*, 311.

3. If there be an existing debt, the mere fact that the debt is not due, will not authorise the discharge of an attachment. *Read* v. *Ware*, 498.

4. A creditor who has accepted, for the accommodation of his debtor, a bill payable a certain number of days after date, drawn by the latter for the amount of the debt with interest to its maturity, where the bill has been discounted by a bank and the proceeds applied to the extinguishment of the original debt, cannot, before maturity of the bill and its payment by him, be considered as a creditor of the defendant, and as such entitled to an attachment against him. The holder was the creditor; and where, in such a case, an attachment was sued out before the maturity of the bill or its payment by the acceptor, a subsequent payment at maturity cannot give validity to the attachment previously taken out. *Ib.*

5. Where a factor, to whom property had been consigned, with directions to apply the proceeds to the payment of certain creditors of the principal, agrees with the latter to apply the proceeds to the payment of their claims, the appropriation cannot be affected by a subsequent attachment by a creditor of the principal, the property or its proceeds being beyond the control of the latter. *Cutters* v. *Baker*, 572.

6. An attachment will not lie in an action for damages *ex delicto*. *Prewitt* v. *Carmichael*, 943.

7. Where one of the partners in a mercantile firm established in another State resides in this, and is in the habit of buying goods to be shipped to, and sold by the foreign house, the partnership property will not be liable to attachment for a partnership debt contracted here by the resident partner. *Per Curiam:* The partnership cannot be considered a non-resident, and the credit was given to it. *Munroe* v. *Frosh*, 962.

II. *Affidavit, Bond, &c.*

8. In proceedings by attachment all the forms prescribed by law must be strictly observed, under pain of nullity. *Graham* v. *Burckhalter*, 415.

9. Where an attachment is obtained in an action in which plaintiff claims a certain sum, with interest from a date anterior to the institution of suit, a bond for a sum exceeding by one half the principal, exclusive of interest, is insufficient; nor can the defect be cured by subsequently furnishing bond for a sufficient amount. *Per Curiam:* A sufficient bond was a condition precedent to issuing the attachment. C. C. 245. *Ib.*

10. Under the 5th sec. of the stat. of 20 March, 1839, amending art. 243 of the Code of Practice, it is sufficient to authorise an an attachment, that the creditor should swear that he verily *believes* that the debtor resides out of the State; it is not necessary that he should swear positively that he does so. *Clements* v. *Cassily*, 567.

11. An affidavit for an attachment, which states that the defendant "is justly indebted to the plaintiff in the sum of (mentioning the amount) for services rendered and to be rendered by deponent as clerk, part due, and a part of said sum not due; and that deponent verily believes that said defendant has left the State to reside permanently out of it," is insufficient to sustain an attachment for any amount. *Per Curiam:* As regards the amount not due, the affidavit is clearly defective. To attach for a debt not due, the creditor must swear that the debtor is

about to remove his property out of the State before the debt becomes due. As to the amount due, the affidavit is defective for uncertainty. To attach in any case, the creditor must declare on oath the amount due to him. C. P. 240, 243. Stat. 7 April, 1826, sec. 7. *Friedlander* v. *Myers*, 920.

III. *Motion to Dissolve.*

12. The mere bonding of property attached will not preclude the defendant from moving to dissolve the attachment. *Brinegar* v. *Griffin*, 154.

13. A motion to amend a rule to show cause why an attachment should not be dissolved, by adding a new ground, may be allowed even after the trial of the rule has commenced, where no issue has been joined in the case, and where the additional ground was based on matter apparent on the face of the petition, and its allowance was not calculated to delay the trial of the rule, nor to take the other party by surprise. *Ib.*

14. Where a defendant seeks to dissolve an attachment on the ground of the falsehood of the affidavit made to obtain it, he may proceed summarily, by a rule to show cause. C. P. 258. It is not necessary that such a defence should be set up by plea or exception. *Read* v. *Ware*, 498.

IV. *Bonding of Property.*

15. Where a debt was attached by a third person, but the attachment subsequently set aside upon the execution of a bond by the defendant in attachment, the bond stands in lieu of the property attached, and, after the release which it operates, the pendency of the suit cannot be urged by the debtor as a reason for withholding any part of the debt. *Benton* v. *Roberts*, 243.

V. *Garnishees.*

16. The forbearance of a plaintiff, by whom an action had been commenced by attachment, in which certain persons were made garhishees, to obtain a judgment against the latter at the same time that judgment was rendered against the defendant, is no waiver of his right to proceed against them at a future day. *Sturges* v. *Kendall*, 565.

17. Where garnishees are cited to answer interrogatories within a certain time, their neglect to answer is considered to be a confession that they have in their hands property belonging to the debtor to the amount stated in the interrogatories; and this confession authorises a judgment against them without the formality of a default; nor are they entitled to any notice of the plaintiff's intention to render them liable, upon the confession which the law infers from their silence. C. P. 263. *Ib.*

18. The neglect of garnishees to answer interrogatories can be considered as a confession of having in their hands property of the defendant, only to the amount of the debt mentioned in the interrogatories. *Ib.*

VI. *Judgment and Damages.*

19. In cases of attachment, as in others, all irregularities in the proceedings anterior to the judgment, except an entire want of citation, must be corrected by appeal, or in some direct proceeding instituted before the same court to set aside such irregular proceedings; their validity cannot be questioned collaterally. *Gibson* v. *Foster*, 503.

20. Judgments rendered in cases of attachment, where the defendant has not been cited and has not appeared, are *in rem*, and only affect the property attached.—*Broughton* v. *King*, 569.

21. Where one by whom an attachment had been sued out abandons the case, under circumstances which show that in instituting the suit he was not acting in good faith, the defendant may recover from him, in an action on the attachment bond, fees of counsel paid to defend the attachment.—*Littlejohn* v. *Wilcox*, 620.

22. The seizure of property belonging to a third person, under an attachment will not subject the officer to damages in all cases. The circumstances of the case may exempt him from liability. *Whitton* v. *Jones*, 802.

ATTORNEY AT LAW.

1. Without the express authority of his client an attorney at law can receive nothing but money in satisfaction of a judgment belonging to the former. *Perkins* v. *Grant*, 328.

2. Where, after services rendered by an attorney have ended, the compensation is fixed by the mutual agreement of the parties, and no error is shown, effect will be given to the contract. In such a case, the parties having themselves established the value of the services, the compensation cannot be withheld on the ground of exorbitancy. *McElrath* v. *Dupuy*, 521.

3. Where an attorney at law, appointed curator *ad hoc* to represent an absentee and defend an action instituted against him, is afterwards retained by the latter as his counsel, an *ex parte* order of the court, made at the time of rendering judgment in the case, allowing him a certain fee for his professional services, but made without the assent of the counsel, and not subsequently acquiesced in by him, is not a judgment, and cannot be pleaded as *res judicata* to an action by the counsel, on his

contract with the client, for the compensation due for his professional services. *Per Curiam:* The order decreeing a sum to be paid to the attorney, who was no party to the action, was not a judgment. There were no parties before the court between whom such a decree could be rendered. *Gilbert* v. *Neal*, 904.

4. An attorney at law will not be allowed to testify as to communications made to him by a client in the course of his professional employment, unless the client himself consent to their disclosure. *Sucession of Harkins*, 923.

5. Although, under our laws, an attorney at law is a competent witness for his client, the position of an attorney offering himself as such is one of extreme delicacy both to the witness and the court; and it is always desirable, for the harmony of the profession, the independence of the bench, and the public confidence in the administration of justice, that an attorney should not be a witness, except in extreme cases, when all other means of proof are impossible: and then the attorney should withdraw from participation in the case. *Ib.*

See CITATION, 4, 5. CONTINUANCE, 3. JUDGMENT, 7. MANDATE, 16.

BAIL.

Bail not fixed with the debt before the passage of the act of 28 March, 1840, "abolishing imprisonment for debt," were discharged by that act. *Thomas* v. *McNeil*, 759.

BANK.

See BILLS OF EXCHANGE, &c., 6. INSOLVENCY, 1, 2, 7. MANDATE, 17. MORTGAGE, 34.

BANKRUPT.

1. Where one holding a mortgage on property offered for sale by order of the District Court of the United States, sitting in bankruptcy under the stat. of 19 August, 1841, never proved his claim in bankruptcy, and, though notified of the sale, from a wish to avoid recognizing the power of the court to sell mortgaged property, took no part in the proceedings, he will not be estopped from disputing the title of the purchaser. His conduct could not mislead or deceive any one. *City Bank* v. *Houston*, 114.

2. The jurisdiction conferred on the courts of the United States in matters of bankruptcy, by the stat. of 19 August, 1841, is restricted to the unencumbered assets of the bankrupt, except where parties voluntarily apply to the court for relief, or remedies are sought to be enforced against them which are authorized by special provisions of that act. The object of that statute being the discharge of debtors from their debts, it affects only such rights of property as stand in the way of that object. The 11th sec. provides that the assignee may, under the authority of the court, redeem and discharge any mortgage or pledge, deposit or lien upon any property, real or personal, whether payable *in præsenti* or at a future day, and tender a due performance of the conditions thereof. The assignee may thus remove the encumbrance by satisfying the creditor, he may sell the property *cum onere*, or he may leave the creditor to exercise his rights at his option; but no power is given over such mortgage, pledge, deposit, or lien, except to satisfy it, and thereby release the property. Sec. 2. *Ib.*

3. A debtor of one declared a bankrupt under the act of Congress of 19 Aug. 1841, when proceeded against by an individual creditor of the bankrupt for the purpose of obtaining, separately, satisfaction of his claim, may set up in defence the exclusive right of the assignee of the bankrupt to recover the debt, and the pendency of a suit instituted by the latter for that purpose. *David* v. *Ferrand*, 596.

4. The assignee of a bankrupt is not obliged to take property of the bankrupt which will be a charge to the creditors—as an *hereditas damnosa*, or a litigious right, the sale of which will involve the estate in fruitless litigation. *Oakey* v. *Gardiner*, 1005.

5. A factor who receives a note for collection on account of his principal, and collects and retains the amount of the note, does not act in a "fiduciary" capacity, within the meaning of the first section of the bankrupt act of 19 August, 1841; nor is the money so received a "trust fund", in the sense in which those words are used in the fourth section of that act. The statute was intended to embrace only the defalcations of public officers, administrators, etc. *Commercial Bank* v. *Buckner*, 1023.

See MORTGAGE, 23. PRIVILEGE 25. SALE, 56.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

I. *By what Law governed.*

1. A note made and payable in another State must be governed by the laws of that State. *Murray* v. *Gibson*, 311.

II. *Title to, and Transfer.*

2. The holder of a note endorsed in blank is presumed to be the owner, until the contrary be shown. *Succession of Nicolas*, 97.

3. By the laws of Mississippi payment of a promissory note by the maker, before maturity, and prior to the acquisition of the note by a third person, who obtained it without notice of the payment, though the note be not delivered to the maker, is binding on such third person; but a payment, after the acquisition of the note, would create no equity against him. *Murray* v. *Gibson*, 311.

4. When a negotiable note is endorsed in blank, an action may be maintained on it by the holder, in his own name, though the note be held by him, in fact, as a trustee. He need not allege the nature of his possession. *Bacon* v. *Smith*, 441.

5. Where a promissory note endorsed in blank by the payee and a third person, and delivered by the maker to the syndic of an insolvent in payment of the price of property purchased at the sale of the insolvent estate, is transferred to a third person by the syndic, without any order of court and in violation of his duty, by an endorsement in blank made by the syndic in his individual name, and the note is transferred to a fourth holder, before maturity, in the ordinary course of business, in good faith, and for a valuable consideration, the fact of the transfer by the syndic, without an order of court, will not affect the right of the holder. The creditors of the insolvent must look to the syndic or his sureties. *DeGoer* v. *Kellar*, 496.

6. Sec. 7 of the stat. of Mississippi of 21 February, 1840, prohibiting any bank in that State from transferring "by endorsement or otherwise, any note, bill receivable, or other evidence of debt," cannot be considered as prohibiting a bank from collecting its dues, by accepting payment of a note due to it, after maturity, from a third person, nor as depriving the latter of the right to be refunded the amount out of the succession of the maker. *Succession of McNeil*, 567.

7. Where a promissory note is payable, on its face, to the tutor of minors, it is notice that the obligation belongs to the minors, and a holder can acquire, by taking it, no rights adverse to the parties in whose interest the restriction is made. *McMasters* v. *Dunbar*, 577.

8. In an action by the holder of a promissory note, payable to a party as tutor of certain minors, endorsed in blank by the latter, it is incumbent on the plaintiff to establish any matter of account between the tutor and the minors, which may constitute a *bond fide* ownership of the note in the plaintiff. *Ib.*

9. Decision in *Nicholson* v. *Chapman*, 1 An. R. 222, affirmed, *Nicholson* v. *Jacobs*, 666.

10. Where in an action by the holder of a note against the maker, there is no allegation nor proof, that certain obligations of the payee, pleaded in compensation by the maker, were held by him before the transfer of the note to the plaintiff, the latter will be entitled to recover, though the note was transferred to him after maturity. *Hueston* v. *Jones*, 937.

III. *Rights and Obligations of Parties.*

11. A bill of exchange requesting the drawees, at a certain time after date, to pay a certain sum to the order of a third person, and "to charge the same to account," signed by the drawers, binds the latter jointly only, and not *in solido*. *Cooper* v. *Polk*, 158.

12. Though a joint and several note, signed by several parties, was executed exclusively for the benefit of one, none of them can be regarded as sureties in relation to the payee (C. C. 2086. 2089); but, as between themselves, the other makers are sureties of the one for whose benefit the note was made, and where one of the former has paid the debt, he has his remedy against his co-sureties, in proportion to the share of each. C. C. 3027. The makers not standing in the relation of sureties to the payee, payment before suit did not forfeit the recourse of the party, by whom the payment was made, against his co-sureties. *Ferriday* v. *Purnell*, 334.

13. Where a joint and several note is signed by an individual, and by a commercial firm in their partnership name, they being in fact the sureties of another maker for whose benefit the note was executed, the partnership must be considered only as a single party to the note, and between themselves and their co-surety, they are liable for only one-half of its amount. *Ib.*

14. One who endorses a note, for the accommodation of the maker, which is afterwards discounted in bank and the proceeds applied for the benefit of the latter, cannot protect himself from liability in case of non-payment at maturity, on the ground of want of consideration. He had no right to have the proceeds of the note placed to his credit. *Union Bank* v. *Morgan*, 418.

15. One who endorses a note to which he was not a party, is presumed to bind himself as surety. *Drew* v. *Robertson*, 592.

16. It is no defence to an action against the maker of a note, by the last endorser, who had paid a part of its amount, after protest, to the holder, that the defendant made the note for the accommodation of a previous endorser, who had put it in circulation, where there is no proof that the re-

lations between the latter and the maker were known to plaintiff. In the absence of such proof the defendant must be considered to have endorsed the note upon the faith of the antecedent names. *Newman* v. *Goza*, 642.

17. The testimony of a witness that the last endorser of a note, who had been compelled to pay its amount, told him that he looked only to a previous endorser, and knew nothing of the maker in the matter, is insufficient to discharge the latter. *Per Curiam:* Such loose declarations, made without consideration to a third person, cannot be treated as an abandonment of a lawful claim. *Ib.*

18. Where the endorser of a note, after protest for non-payment by the maker, pays a part of its amount, he may recover such partial payments from the maker. *Ib.*

19. An endorser of a bill or note, against whom an action has been brought by the endorsee, cannot recover from the maker or acceptor the costs of the action, unless in case of an express and collateral contract of indemnity. *Ib.*

20. Decision in *Nicholson* v. *Chapman*, 1 An. R. 222, affirmed. *Nicholson* v. *Jacobs*, 666.

21. The right of an endorser, who has put his name on a note on the faith of the signature of the maker, and who has been compelled to pay the amount to a party by whom it was discounted before maturity, to recover against the maker, cannot be affected by the fact of the latter's being a creditor of a prior endorser at the time of his endorsement. *Vance* v. *Boyce*, 827.

22. On production of the half of a bank note and on accounting for the loss of the other half, the bank will be bound to pay the full amount for which it was issued, on being secured against liability for the other half. C. C. 2258. But in such a case interest will not be allowed from judicial demand, if objected to by defendant. *Little* v. *Consolidated Association*, 1012.

23. A refusal by the Consolidated Association to pay the amount of note issued by it, on the production of a half of the note and accounting for the loss of the other half, will not subject that institution to the penalty of paying interest at the rate of twelve per cent a year, under the 15th section of the act of incorporation of 10 March, 1827. *Ib.*

See ATTACHMENT, 4.

IV. *Presentment for Payment, Protest, and Notice.*

24. Where no enquiry was made of the maker of the note, nor of his syndic when he had failed, nor of a person of the same sir-name with the endorser, but the initial letter of whose first name was differently printed in the city directory, sufficient diligence will not be considered to have been used, to ascertain the residence of an endorser living in the city where the note was payable, to excuse want of notice of protest. *Vance* v. *Depass*, 16.

25. Where notice of protest of a note, payable in a particular parish, is shown to have been mailed, addressed to the indorser at a post-office in another parish, in which he resided, it is for him to prove that there was another office nearer to his residence. *Medley* v. *Voris*, 140.

26. Where a notary by whom a note was protested, states that he made diligent enquiry for the domicil and usual place of residence of the endorser, but does not state that he made any attempt to ascertain at what post-office notice of protest should be addressed, the proof is insufficient to show due diligence. *Canal and Banking Company* v. *Bry*, 303.

27. Where the endorser of a note resided, at the time of protest, about nine miles from the town in which the note was payable, and was in the habit of receiving his letters and papers at the post-office in that place, notice of protest deposited in that post-office, on the day of protest, and addressed to him at that place, is sufficient. *Canal and Banking Co.* v. *Barrow*, 303.

28. Notice of protest addressed to the endorser of a note at the post-office at which he was in the habit of receiving his letters and papers, mentioning the State in which it is situated, is sufficient, though the name of the parish be not mentioned. *Hepburn* v. *Ratliff*, 331. *Bird* v. *McCalop*, 351.

29. Where the certificate of a notary, offered to prove notice of protest to the endorsers of a note, written at the foot of a notice of protest dated 26th of June, 1841, the day of the maturity of the note, states that "a copy of the above notice was, on the 26th inst., put in the post-office," &c., directed to the endorsers, it is not sufficient. The omission to state in the certificate the month and year, cannot be cured by any inference from the date of the notice. *Menard* v. *Winthrop*, 333.

30. Where a bill, drawn by one who was at the time cashier of a branch bank, payable to a person who was president of the branch, and endorsed by him, and by a third person who was a director of the same branch, who is presumed to have received the proceeds, was discounted by the branch, but not protested at maturity, the circumstances under which the note was discounted, by the act of one of the endorsers, and with the approbation of the other, will take the case out of the rules applica-

ble to ordinary endorsers. *Per Curiam:* Both endorsers being bound to see the note paid, they will not be permitted to profit by the neglect or fraud of an officer of the bank, whose conduct they were bound to supervise, to exonerate themselves from liability as endorsers. *New Orleans and Carrollton Railroad Company* v. *Patton*, 350.

31. Where an endorser does not reside in the town in which the note is payable, but receives his letters and papers from the post-office at that place, a notice of protest put into the post-office there, addressed to him at his domicil, though not intended to be forwarded by mail, will be sufficient. *Bird* v. *McCalop*, 351. *New Orleans and Carrollton Railroad Company* v. *Patton*, 352.

32. Where a note payable at a bank is held by the bank itself, no formal demand of payment is necessary during banking hours. The maker, having promised to make payment at the bank, it is his duty to be there within the usual banking hours. After these hours, it is time enough to deliver the note for protest. *Thomas* v. *Marsh*, 353.

33. Where the cashier of a bank, which is the holder of a note, delivers it to a notary for the purpose of being protested, it is not necessary that the notary should state in his protest, that he exhibited the note to the cashier at the time of demanding payment. The object of presentment and exhibition being that the debtor may know that he is paying to a party entitled to receive, and that the note is ready to be delivered to him on payment, the exhibition would be unnecessary in such a case, the cashier having himself handed the note to the notary. *Ib.*

34. The declaration of an endorser that he had received notice of the protest of the note, and that it would be necessary to make arrangements to pay it, unaccompanied with any complaint as to informality, will be taken as to an admission of his liability founded upon seasonable notice. *Ib.*

35. A notice of protest received through an irregular channel, if it reach the party as soon as he could have received it by the regular mode of transmission, is binding. *Ib.*

36. Where a note is payable at the office of a particular bank, a demand of payment at the place specified, of one apparently in charge of the affairs of the bank as its cashier or agent, if the maker be not present, is sufficient. The holder is under no obligation to present it elsewhere, nor personally to the maker; and where the notary states in his protest that a demand was made of one having apparently such authority as agent, it will be *primâ facie* evidence of the fact, and throw on the defendant the burden of proving it untrue. *New Orleans and Carrollton Railroad Company* v. *McKelvey*, 359.

37. In an action on a note payable at the place of business of the holder, demand at the place of payment need not be alleged or proved, to authorise a recovery against the maker. *Brander* v. *Cobb*, 396.

38. Where a note is payable at a bank, a demand made of the president of the bank, is a sufficient demand. *Union Bank* v. *Morgan*, 418.

39. It is no objection to a notarial protest and certificate of notice, that the notary was himself the maker of the protested note. There is no conflict in such a case between the official duty of the notary and his personal interests, he being primarily liable as maker whether the endorser was discharged or not; and he acts against his interest in certifying his own default. *Ib.*

40. Under the stat. of 13 March, 1827, the original protest and certificate of notice of the protest of a bill, or the duplicate originally kept by the notary, are admissible in evidence, though the protest was not transcribed in any book, nor any record book was kept by him as required by the stat. of 14 February, 1821. *Ib.*

41. Where a note held by a bank, payable at its office, was in the hands of the cashier at the time that demand of payment was made of him by the notary, it is no objection that it does not appear that the notary himself had the note in his possession when he presented it for payment. *Aliter*, had the bank not been the holder, and the place of payment not at the bank. *Ib.*

42. Notice of protest addressed to the endorser of a note at a village, the post-office in which was nearest to his residence, mentioning the parish and State, is a sufficient compliance with the stat. of 13 March, 1827, § 2, requiring the notice to be addressed to the party, "at his domicil or usual place of residence." *Ib.*

43. In an action against the endorser of a note protested in another State, the testimony of the notary by whom the protest was made, or that of other witnesses, will be admissible to prove the fact of his being a notary. *Per Curiam:* The strong presumption arising from the undisturbed exercise of a public office that the appointment to it is valid, renders it, in general, unnecessary to prove the written appointment of public officers. All who are proved to have acted as such are presumed to have been duly appointed, until the contrary appears. There is an exception to this rule, where the officer, being plaintiff, avers his title to the office, or the mode of his appointment. *Planters Bank* v. *Bass*, 430.

44. Where in an action by a bank established in another State, on a note discounted by it and payable at its office, it is proved that the notary by whom the note was pro-

tested had died before the trial, and that he was the agent usually employed by the bank to make demands and give notices of protest, the protest made by him will be admissible as a memorandum of his acts, and will be evidence of them. *Ib.*

45. Notice of protest to an endorser residing in a parish in this State, addressed to him at the post-office nearest to his residence, though in another State, in the absence of any proof of his being in the habit of receiving his letters and papers at a more distant office, is sufficient, though his domicil be not mentioned in the address. *Ib.*

46. In an action against the endorser of a note who resided at the time of the protest in the parish of S——, the certificate of a notary, by whom the note was protested, "that the parties were duly notified of the protest thereof, by letters to them written and addressed, &c., and served upon them in the manner following, by means of written notices addressed to the endorsers, all of the parish of St. Mary, which notices I deposited in the post-office," &c., will be insufficient to charge the endorser. *Per Curiam:* The notary certifies that the endorsers were "all of the parish of S.," but we are not permitted to infer that the notices were addressed "Parish of S." In the absence of any further direction, the letter enclosing the notes would have remained in the office in which it was deposited. *Union Bank* v. *Campbell*, 759.

47. A notice of protest addressed to the post-office at which an endorser habitually receives his letters, though not the nearest to his residence, is sufficient to fix his liability. *Citizens Bank* v. *Walker*, 791.

48. Any address of a notice of protest which will ensure its transmission to the proper post-office, is sufficient. Thus where it is shown that by addressing a notice to an endorser "at the parish of R.," the letter will be taken out and retained for delivery at the office to which the notice should be sent, the name of the office need not be mentioned in the address. *Ib.*

49. Where the certificate of a notary, dated on the day on which the protest of a note was made, recites, that the parties *have been* duly notified of the protest thereof, by notices put into the post-office in time to go by the first mail, after the protest, &c., it must be understood as certifying that the notices were mailed on the day of protest, and that they had been mailed at the time the certificate was signed. *Kerr* v. *Wells*, 832.

50. Proof that the notary, by whom a note was protested, enquired of the cashier of the bank in which it was payable, and who was the holder of the note as agent, for the residence of the endorser, is not evidence of due diligence, and will not excuse the omission to address a notice of protest, deposited in the post-office, to the domicil or place of business of the latter. When the domicil or place of business of an endorser is unknown, the holder must make reasonable enquiries, and use due diligence, to ascertain them. *Union Bank* v. *King*, 928.

51. Interest will be allowed from maturity on a note payable at the counting-house of the payee, bearing interest "after due until paid," though the protest, made several years afterwards, was the only evidence of a formal presentment at the place of payment, when the tenor of a letter written by the maker to the plaintiff, recognising the debt and promising payment, justifies the inference that the defendant had provided no funds at the place of payment. *Kenner* v. *Peck*, 938.

52. Where notice of protest of a note is left at the counting-room of an endorser, with a person who declared himself to be his agent, the notice, having been left at the proper place, cannot be affected by proof that the person with whom it was left was not the agent of the endorser. *Jacobs* v. *Turner*, 964.

V. *Release of Parties and Extinguishment.*

53. Where the holder of a bill of exchange, drawn on merchandize, at ten days' sight, and accompanied by a bill of lading, does not present it for acceptance according to its tenor, although the drawers were willing to accept upon delivery of the bill of lading, but demands immediate payment, and, on their refusal, transfers the merchandize represented by the bill to another house, the drawer will be discharged. *Benoist* v. *Reyburn*, 137.

54. Plaintiff sold property to defendant for a certain price, on credit, taking an endorsed note for the amount. A creditor of the latter having seized the property under a *fi. fa.*, plaintiff enjoined the proceedings, claiming to be the owner, under a deed from defendant to him by which the property was re-conveyed for the amount of the note; but the injunction was dissolved, the reconveyance being considered as simulated. In an action by the plaintiff, against the endorsers on the original note: *Held*, that whether the reconveyance was executed in good faith, or was simulated to defeat the rights of the seizing creditor, plaintiff cannot be permitted to treat it as other than genuine, and that, considered as such, it extinguished the note. *Freeman* v. *Savage*, 269.

55. Where judgment has been obtained

against the maker and endorsers of a note, an agreement to suspend execution for a short time against the maker, will not discharge the endorsers. *Louisiana State Bank* v. *Haralson*, 456.

56. Where the endorser of a note unites with the maker, in mortgaging to the payee property which they owned jointly, to secure its payment, a subsequent discharge of the endorser, by the *laches* of the holder, will release the endorser from any personal liability for the debt; but the holder of the note will be entitled to the benefit of his mortgage. *Kerr* v. *Wells*, 832.

57. Where one who has obtained a judgment against the maker and endorser of a note, colludes with the parties who were primarily liable on it, for the purpose of screening their property under pretended judicial sales, the liability of the last endorser will be discharged; nor can it be revived by the transfer of the judgment to third persons. *Toler* v. *Swayze*, 880.

See PRESCRIPTION, 14, 28.

VI. *Promise to Pay after Discharge.*

58. Where the endorser of a note, who had been discharged by want of notice of protest, on being applied to for payment stated, "that he had been very unfortunate in endorsing the note, that he could not pay it, that the estate of the maker owed him money, and that he had no means of paying it but from that source," it will not be considered as a promise to pay the note. *Per Curiam:* Where there has been *laches* on the part of the holder of a note, by which the endorser has been discharged, a promise to pay, to be obligatory, must be deliberately made, in clear and explicit language, and amount to an admission of the rights of the holder, or of a duty or willingness to pay. *Vance* v. *Depass*, 16.

59. Defendants, holders of a note endorsed by plaintiff, gave it up to him, on the latter's executing his own note for the amount, payable at a future period. Judgment was obtained upon the last note, without defence; and the present plaintiff purchased the property seized under execution against him, and gave a twelve-month's bond for the price. An order of seizure having been issued on the twelve-month's bond, plaintiff enjoined it on the ground that he had executed his note in error, not having been aware at the time that he had been discharged from all liability as endorser by the *laches* of the defendants, but he made no tender of the note on which he was endorser: *Held*, that the injunction must be dissolved, the plaintiff having no right to require the second note to be cancelled without restoring the original note received from the defendants. *Brown* v. *Lambeth*, 822.

60. To entitle the holder of a promissory note to recover against an endorser, on the ground of a promise to pay made after the latter had been discharged by failure to protest, the plaintiff must show that the promise was made by the endorser with full knowledge of his discharge. *New Orleans and Carrollton Railroad Co.* v. *Mills* 824.

See PRESCRIPTION, 21, 22.

VII. *Evidence.*

61. Where in an action against the drawer of a bill of exchange endorsed in blank, plaintiff sues as executor, proof of his being executor is unnecessary, though specially denied. *Per Curiam:* The bill being payable to bearer, whether the plaintiff chose to style himself executor or to sue in his own name, was immaterial. The only effect of the allegation would be to estop him from denying it, and to bind him by any defence which the drawer could set up against the succession he pretended to represent. *Montgomery* v. *Myers*, 276.

62. Where, in an action by the holder of a promissory note endorsed in blank, plaintiff alleges that, by a second endorsement in blank, made by certain persons as commissioners of a bank, the note was transferred to him, the allegation is unnecessary; and, in the absence of any pretence of an equitable defence against the bank, or of plaintiff's having come unfairly by the note, he will not be required to prove the authority of the commissioners. *Hepburn* v. *Ratliff*. 331. *Bird* v. *McCallop*, 351.

63. Where a note appears on its face to have been altered in a material part, the amount and place of payment being written over erasures, rendering the note suspicious, in an action on it by a bank by which it had been discounted, against an accomodation endorser, not shown to have delivered the note to the bank, plaintiffs must prove that the alterations were made under circumstances which will render the note available. Erasures in a note will be presumed to be false. *Union Bank* v. *Brewer*, 835.

64. Where in action by the holder of a note, not endorsed by the payee, plaintiff alleges that he is the owner, the allegation of ownership sufficiently implies a transfer to authorise the admission in evidence of a notarial act of transfer and subrogation by the payee to the plaintiff. *Jones* v. *Elliot*, 1009.

See EVIDENCE, 37.

CAPIAS AD SATISFACIENDUM.

A curator of a vacant succession is not a public officer, within the meaning of sec. 14 of the stat. of 10 Feb. 1841; and since the stat. of 28 March, 1840, abolishing imprisonment for debt, a *ca. sa.* cannot be taken out, after the return of a *fi. fa.* unsatisfied, against one who has converted to his own use money received by him as curator of a vacant succession. *Succession of Kelly*, 574.

CITATION.

1. Where a citation signed by the clerk, purports to have been issued from a District Court sitting in a particular parish, and calls upon the defendant to file his answer in the clerk's office of that court, at a certain place, it is a sufficient description of the place where the clerk's office is held. C. P, 179. *Medley* v. *Voris*, 140.

2. It is no objection to a citation served on a curator *ad hoc*, appointed to represent an absent defendant, that it was addressed to the absentee. The citation should be served on the curator, and whether addressed to him or to the person whom he represents, is immaterial. *Cooper* v. *Polk*, 158.

3. After the dissolution of a partnership, and notice thereof by an advertisement in the newspaper of the village where the partnership business was carried on, service of citation upon one of its members will not authorise a judgment against the rest. In a direct action against a partner, for dealings had with the firm after its alleged dissolution, the fact that plaintiffs were in the habit of dealing with the partnership would render it necessary to bring notice of the dissolution home to them, otherwise than by notice in a newspaper; but this fact cannot affect the manner of bringing the partners of a dissolved partnership into court. *Brashear* v. *Dwight*, 403.

4. Acceptance of service of a petition and waiver of citation, made by the attorney at law of a defendant, are sufficient, *Ingram* v. *Richardson*, 839.

5. The word "attorney" in art. 177 of the Code of Practice means attorney at law, and not attorney in fact. *Ib.*

6. A curator *ad hoc* appointed to represent an absentee may acknowledge service of citation and petition. Such an acknowledgment is not a waiver of any right of the absentee. *Millaudon* v. *Beazley*, 916.

See Appeal, 6. Attachment, 20. Executory Process, 1. Sheriff, 10.

CODES, ARTICLES OF, CITED, EXPOUNDED, &c.

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19	782	500	376	1265	412
21	87	"	403	1292	749
25	462	551	30	1304	329
42	946	552	"	1320	634
52	1010	556	71	1370	462
57	562	839	626	1402	87
"	916	841	"	1403	"
"	1010	859	770	1453	30
120	462	867	405	1455	"
168	897	871	98	1456	667
170	406	883	"	1468	517
180	"	902	780	"	952
181	798	911	98	1480	30
234	293	"	268	"	293
272	401	913	98	1485	30
302	941	917	"	1500	767
303	"	918	"	1507	377
305	"	"	268	1514	766
322	623	923	98	1523	724
326	293	934	339	1525	766
"	751	939	"	1563	30
327	316	940	466	1574	724
"	462	992	462	1575	"
328	"	993	4	1576	"
330	402	997	"	1583	667
331	"	1024	466	1584	"
332	"	1035	268	1683	78
338	162	1040	412	1684	"
348	71	1042	966	1686	"
350	"	1046	575	1708	580
355	"	1053	4	1739	30
356	160	1056	412	1745	"
368	553	"	459	1751	667
371	293	1057	4	1775	418
376	553	1066	412	1778	367
377	"	1114	97	1785	"
389 to 394	271	1116	"	1788	727
		1117	"	1842	458
424	897	1129	466	1867	398
429	"	1157	966	1869	367
430	"	1164	782	1884	940
454	451	1168	895	1903	654
456	"	1169	"	"	746

III. *Code of Practice.*

COMMUNITY.

See MARRIAGE, IV.

COMPENSATION.

1. Where a factor receives the proceeds of a crop to be held at the disposition of

the owner, the amount cannot be considered as an ordinary debt, upon which compensation necessarily operates. It is an irregular deposit, identical with a loan for use; and no compensation takes place as to a demand for the restitution of a deposit or loan for use. C. C. 2207, 2927. *Bloodworth* v. *Jacobs*, 25.

2. The amount of a judgment obtained in the court of the first instance, from which a suspensive appeal was still pending, cannot be compensated against a twelve-month's bond already due. *Benton* v. *Roberts*, 243.

3. Open accounts against a plaintiff, not acknowledged by him, transferred to defendant by a third person, cannot be pleaded in compensation, in an action by plaintiff on a promissory note. *Gas Bank* v. *Hill*, 402.

4. A debtor of an insolvent succession cannot plead in compensation, judgments against the succession acquired by him since he became its debtor. His claim under such judgments can only be paid contradictorily with the other creditors of the succession, and partially or in full, according to its rank. C. C. 1056. *Dwight* v. *Carson*, 459.

5. A claim for real estate cannot be compensated against sums due by promissory notes. C. C. 2205. *Girod* v. *Creditors*, 546.

See Bills of Exchange, &c. 10. Pleading, 13, 22, 23.

CONSTITUTION.

I. *State Constitution of* 1812.

II. *State Constitution of* 1845.

See Tax, 1.

III. *Constitution of United States.*

See New Orleans, 3.

CONTINUANCE.

1. To entitle a party to a continuance to obtain the return to a commission, where the commission was not applied for within the time prescribed by a rule of court, the party must show due diligence, and circumstances justifying an exception to the rule in his favor. *Benoist* v. *Reyburn*, 137.

2. A case will not be continued in order to allow a party to procure the evidence of witnesses absent from the State, where no diligence has been used to obtain their testimony. *Edwards* v. *Farrar*, 307.

3. After a jury has been sworn, a continuance cannot be claimed by the counsel of a party, on the ground of want of time to prepare himself to try the case. *Broughton* v. *King*, 569.

CONTRACT.

See Bills of Exchange, &c. Interpretation. Lease. Loan. Mandate. Marriage. Mortgage. Obligations. Partnership. Pledge. Sale. Shipping. Surety.

CORPORATION.

1. Where the business of an incorporated company is of such a nature as to require it to be conducted through servants or agents, notice to one of its officers relative to a matter in which he acted within the scope of his employment and in the usual course of the company's business, will bind the company. *Pontchartrain Railroad Company* v. *Heirne*, 129.

2. Where, on counting the votes put into the ballot-box in an election for an officer by a municipal council, it appears that thirteen votes were put in, when the members present were only entitled to give twelve votes, and that seven were in favor of plaintiff and six for another person, there is no election. *Labourdette* v. *First Municipality*, 527.

3. Where a municipal corporation is authorised to impose a wharfage charge, as a compensation for keeping the wharves in a proper condition for the safe and expeditious shipping and landing of merchandise, a court will not undertake to fix any limit to the amount which the municipal authorities may exact for that purpose. The question of the extent to which this right may be exercised, is purely administrative. *First Municipality* v. *Pease*, 538.

See Servitude, 6, 7.

COURTS.

I. *Courts of United States.*

1. Whenever the courts of the United

States have jurisdiction *ratione personæ*, their jurisdiction *ratione materiæ* extends to all cases within the pecuniary limits fixed by law. Their jurisdiction is not limited or restrained by the local remedies of the different States. *Dupuy* v. *Bemiss*, 509. *Dupuy* v. *Hunt*, 562.

2. The fact of a succession being under administration in a Court of Probates as constituted under the judicial organisation existing anterior to the constitution of 1845, could not deprive a Circuit Court of the United States of jurisdiction to order the sale of property forming part of the succession. *Ib.* 509, 562.

See 4 *infra*. BANKRUPT 2.

II. *State Courts Generally.*

3. Where the business of a particular partnership was transacted almost entirely within this State, and the investigation of an important portion of the partnership accounts can be conducted with greater convenience and at less expense here than elsewhere, the mere fact of the partners being residents of another State will not, where the defendant appears in person, deprive our courts of jurisdiction of a suit to settle the partnership. *Brinegar* v. *Griffin*, 154.

4. State courts have no jurisdiction of an action for freedom, instituted by one held as a slave against a person by whom it is alleged that she was illegally brought into the State from a foreign country, or against those holding under such a person. The courts of the United States have exclusive jurisdiction to ascertain and punish the offence of such an illegal importation; and, if the offence be established, the person imported must remain in the custody of the marshal, subject to the orders of the President of the United States. Acts of Congress of 20 April, 1818, and 3 March, 1819, s. 3. The laws of this State do not consider that the freedom of the slave can be acquired by such an illegal importation. *Isabella* v. *Pecot*, 387,

III. *Supreme Court.*

5. Where an appeal is tried before three judges, the concurrence of two is sufficient to reverse the judgment of the inferior court. Const. art. 68. *Beaulieu* v. *Furst*, 46.

6. The Supreme Court has no general supervising power and control over courts of inferior jurisdiction. The power it is authorized to exercise through writs of mandamus and prohibition is limited to cases in which its exercise is incidental to, and in furtherance of, its appellate jurisdiction. *Succession of Whipple*, 236,

7. A writ of prohibition will not be directed to a District Court of New Orleans to forbid its assuming jurisdiction in the matter of a succession, on the application of one who had been appointed a curator of the same succession by another District Court of the city, where the question of jurisdiction has not been raised or decided by the former tribunal. The question as to which court has jurisdiction depends, under the stat. of 30 April, 1846, § 13, upon the time of filing the petition for the curatorship, and one court has as much authority as the other to determine it, so far as its own proceedings are concerned. The jurisdiction of the Supreme Court being appellate only, and the question of jurisdiction not having been raised in the court to which the prohibition is prayed to be directed, cannot be determined on an application for a prohibition. *Ib.*

8. The Supreme Court has no general superintending jurisdiction over the inferior courts. The jurisdiction of the court in this respect is the same under the present constitution as under that of 1812. *Succession of McCarty*, 979.

9. The summary action of the Supreme Court will be confined to cases in which its interposition is necessary for the maintenance of its appellate jurisdiction. *Ib.*

IV. *District Courts.*

10. Where a *fi. fa.* issued from a District Court is levied on land and slaves, within the jurisdiction of the court of another district, an injunction may be obtained from the latter. *Hobgood* v. *Brown*, 323.

11. The 6th section of the statute of 16 February, 1842, authorising parish judges to discharge the duties of district judges in certain cases, declaring that its provisions shall not apply to districts in which the circuit system exists, and the statute of 26 March of the same year having established that system from the 1st of January, 1843, in the district embracing the parish of Concordia, an order of seizure and sale issued since that date by the parish judge of that parish, acting instead of the district judge, is a mere nullity. *Crowley* v. *Copley*, 330.

12. A widow in community, who has taken the property of the succession into her possession, was suable in courts of ordinary jurisdiction under the organization of the courts anterior to the constitution of 1845; and an action might have been maintained in those courts against minor heirs, represented by their tutrix, *Ingram* v. *Richardson*, 839.

13. Previous to the statute of 18 March, 1820, fixing the jurisdiction of Courts of

Probate, the District Courts were not without jurisdiction, *ratione materiæ*, of an action against the surviving partner of a community, and the tutrix of the minor children of the deceased, to recover a debt due by the deceased. *Robinett* v. *Compton*, 846.

14. While the stat. of 18 March, 1820, relative to Courts of Probate, was in force, an action instituted in a court of ordinary jurisdiction against a curator, executor, or tutor, must have been dismissed, if excepted to for want of jurisdiction; but where judgments have been rendered, under such circumstances, without any exception to the jurisdiction, they will not be treated as nullities. *Ib.*

See INJUNCTION, 8. JUDGMENT, 8.

V. *Courts of Probate.*

15. Under the late judicial system, Courts of Probate had jurisdiction, in all suits for partitions in which minors were concerned. Section 14 of article 924 of the Code of Practice, is not confined to the partition of successions. *Craighead* v. *Hynes*, 150.

16. A Court of Probates has jurisdiction of an action to compel a tutor to account, instituted at any time before his discharge. The court will have jurisdiction, though it be alleged in the petition that the tutor, in collusion with the under-tutor, had been permitted to resign the tutorship without rendering any account. *White* v. *Chaney*, 277.

17. Courts of Probate as they existed before the re-organisation of the judiciary under the constitution of 1845, had jurisdiction of actions for the partition of the property of successions, and power to determine questions of title to real estate arising in such actions, either directly or indirectly. C. P. 1022. C. C. 1250, 1304. Stat. 27 March, 1843, s. 3. *Pierce* v. *Pierce*, 329.

18. Where a Probate Court has jurisdiction of an action for a sum of money against a succession in the hands of an administrator, its jurisdiction cannot be divested by a partition of the succession between the widow and heirs of the deceased, made pending the action. In such a case the administrator may be dismissed, and the widow and heirs be substituted as defendants, and judgment be rendered against them for their respective portions of the debt.

CRIMINAL LAW.

I. *Court for Trial of Slaves.*

1. Where a court organized under the stat. of 1 June, 1846, for the trial of slaves charged with capital offences, fails to convict the accused of the crime with which he is charged, it may, under the 9th section of that act, punish him for any inferior offence established by the evidence, without sending him before the tribunal specially appointed for the trial of minor offences; but unanimity in the court is as essential to decree the milder punishment, as to pronounce the sentence of death. When the court is not unanimous, there is a mis-trial; but such mis-trial will be no bar to a second trial for the same offence. *State* v. *Gilbert*, 245.

II. *Indictment.*

2. A formal averment in an indictment that it was found by the authority of the State, is not essential to its validity. It is a sufficient compliance with the 69th art. of the constitution, that the prosecution appear to be conducted in the name of the State. *State* v. *Russell*, 604.

3. Sec. 3 of the stat. of 6 March, 1819, punishes three distinct offences, the stealing—the inveigling—and the carrying away of a slave, each of which subjects the offender to the same punishment; and where, on an indictment under this statute, the accused is charged with the three offences, and a general verdict of guilty is found against him, and no objection is made to the sufficiency of the indictment as to two of the offences, the verdict will not be disturbed. *State* v. *Dubord*, 732.

4. The provision of sec. 3 of the stat. of 6 March, 1819, as to the stealing of a slave, creates a new offence, different from larceny; and it is not necessary, in indictments under it, to aver the value of the slave, or to use the technical terms descriptive of larceny. The indictment must be governed by the rules applicable to offences created by statute. *Ib.*

5. It is not necessary to the validity of an indictment that the day on which it was found, or the name of the judge presiding, should appear on its face. *State* v. *Folke*, 744.

6. It is no objection to an indictment under the stat. of 2 April, 1832, against a person for selling intoxicating liquors to a slave without the consent of his master, that the accused is described as a "trader in goods, wares, and merchandize, and spirituous or intoxicating liquors. *State* v. *Fant*, 837. *State* v. *Bogan*, 838.

7. An indictment under the stat. of 2 April, 1832, against a person for selling intoxicating liquors to slaves, which charges that the accused "did unlawfully sell, give, and deliver in payment, and cause to be sold, given, and delivered in payment" spirituous or intoxicating liquor, is not defective on the ground of repugnance or du-

plicity in the allegations. *Per Curiam:* The allegations are merely cumulative. A general verdict of guilty on such an indictment would be sustained by proof of any one of the acts charged. *Ib.* 837, 838.

8. The caption forms no part of an indictment, and is not essential to its validity. *Per Curiam:* Captions are of frequent occurrence under the English system, where it is not unusual to try an indictment in a different court from that in which it was found. Under our law, the accused is invariably tried by the court in which the indictment was found, and the necessity for a caption, technically so termed, cannot arise, if indeed it ever becomes necessary, under our system of courts, until an appeal is taken. *State* v. *Peterson*, 921.

9. Judgment will not be arrested on the ground that neither the place where the court was held, nor the name of the judge who presided at the court at which the indictment was found, nor the names or number of the grand-jurors who concurred in finding it, are set out in the caption of the indictment, where the schedule in the record sets forth those facts. *Ib.*

10. It is not necessary that an indictment should contain a distinct averment of the appointment, and oath, of the foreman of the grand jury. *Ib.*

III. *Change of Venue.*

11. By permitting an application for a change of venue, supported by affidavit, to be filed, the prosecuting attorney does not thereby waive his right to oppose its being granted. Stat. 1 June, 1846, ss. 9, 10. *State* v. *Peterson*, 921.

IV. *Jury and Verdict.*

12. A verdict will not be disturbed on the ground of a variance between the names of the jurors who were sworn and tried the case, and those on the list furnished to the accused before the trial. An objection to a juror that his name was not on the list of jurors delivered to the accused before the trial, should have been made when he was presented to be sworn. *State* v. *Dubord*, 732.

13. Where the original entry on the minutes of a court makes no mention of the swearing of the grand jury, merely setting forth the names of the jurors, how they were selected, and the term for which they were to serve, on an affidavit by the clerk that the jurors had been regularly sworn, and that the omission to state the fact was an inadvertence of his own, the minutes may be afterwards amended so as to conform to the fact. Nor will it be any objection to making the amendment, that the omission occurred while another judge presided. *Per Curiam:* The power of correcting the minutes of its proceedings so as to make the entries conform to the truth, whenever errors or omissions are satisfactorily shown, is inherent in every court. In criminal proceedings, all ministerial acts are amendable at any time. *State* v. *Folke*, 744.

14. No writ is required to be issued from the court for selecting and summoning a jury; nor is any order, under the seal of the court, necessary for that purpose. The stats. of 25 March, 1831, ss. 10, 11, and 13 March, 1833, s. 1, direct the clerk and sheriff, or deputy sheriff, to draw, at stated periods, the requisite number of jurors, who are to be summoned. *Ib.*

15. It is not necessary that the foreman of the grand jury should sign his name at full length to the finding endorsed on the indictment. An indictment signed "Geo. W. West, foreman," is sufficient. *Ib.*

16. Where one indicted for murder is convicted of manslaughter, it is not necessary that the verdict of the jury convicting him of manslaughter, should negative the murder. Stat. 20 March, 1818, s. 1. *State* v. *Peterson*, 921.

V. *Evidence.*

17. The confessions of a slave accused of a crime, made under the influence of threats or violence, are inadmissible in evidence to establish his guilt. *State* v. *Gilbert*, 245.

VI. *Appeal.*

18. The jurisdiction of the Supreme Court in appeals in criminal cases being confined by the constitution, art. 63, to questions of law alone, the judge of the inferior court is not bound in any case to make a statement of facts. The questions for the decision of the Supreme Court must be presented by bills of exception or assignments of error. The stat. of 30 May 1846, sec. 8, which provides that, in certain criminal cases, "an appeal may be taken on behalf of the accused, returnable to the Supreme Court as in civil cases," does not alter in any respect the method of trial or rules of proceeding in the inferior court, merely providing for bringing the case before the Supreme Court by appeal, in contradistinction to the proceeding by writ of error. *State* v. *Fant*, 837. *State* v. *Bogan*, 838.

19. The jurisdiction of the Supreme Court in criminal cases being limited to questions of law (Const. art. 63), it cannot examine the evidence introduced on the

trial, though reduced to writing below, and brought up with the record, to determine whether the court exercised its discretion properly, in refusing a new trial on the ground that the verdict was contrary to the law and evidence. *State* v. *Peterson*, 921.

VII.

Forfeited Bonds and Recognisances.

20. The stat. of 1 April, 1835, s. 4, which provides that all bonds and recognizances taken by certain officers in the city of New Orleans, for the public peace or in criminal matters generally, when forfeited, shall be recovered by the city attorneys for the use of the city, is not changed by the stat. of 11 March, 1837, s. 1, in regard to the destination of the amounts of such forfeited bonds or recognisances when recovered; but the latter act authorises a different and more summary proceeding, under the immediate direction of the officers of the State, and in the name of the State, for the collection of such bonds or recognisances as are for the appearance of the parties before the Criminal Court of the First District, though the amount of the forfeiture enure to the benefit of the city. The statute of 1837 is inapplicable where the bond or recognisance is for the appearance of the party before the mayor, recorder, or associate judges of the city; in such a case an action can be maintained only by the corporation, and in the ordinary form. *State* v. *Harris*, 516.

CURATOR.

See Capias ad Satisfaciendum. Successions, IV.

CURATOR AD HOC.

See Absentee, 1, 2, 4, 5, 6, 7. Citation, 2, 6.

CUSTOM.

See Evidence, 33.

DEPOSIT.

Though the distinction formerly existing between a perfect and imperfect deposit is abrogated by article 2934 of the Civil Code, which recognises as the only real deposit a thing received to be preserved in kind, without the power of using it, and to be restored identically, yet parties are at liberty by their contracts, or course of dealing, to create irregular deposits, which, between themselves, are inviolate, and prevent the effects which the law, in the absence of any such agreement or course of dealing, would have upon their respective rights. *Bloodworth* v. *Jacobs*, 25.

DISCONTINUANCE.

1. Where an action has been discontinued, it cannot be revived by a rule to show cause, and, if such revival be allowed, any judgment subsequently rendered will be null. *Gilbert* v. *Meriam*, 160.

2. The discontinuance of a suit cannot affect the legal rights of a party. *McIntosh* v. *Smith*, 756.

DISTRINGAS.

1. A *distringas* will not be issued to compel a specific execution of a judgment rendered against a party for a portion of a crop in kind, where, in consequence of the bonding and sale of the property, it had become impossible to deliver it in kind. *Per Curiam:* The office of the writ is to enforce the performance of things that are possible, not to punish parties for failing to do what is impracticable. *Bowles* v. *Wilcoxen*, 760.

2. Defendant having obtained a judgment against plaintiff for a certain number of hogsheads of sugar due to him as rent, took out a *distringas* to compel a specific execution of the judgment. Plaintiff enjoined the proceedings, on the ground that the sugar having been sold, could not be delivered in kind; the injunction was sustained as to the delivery of the particular sugar, but it was ordered that an equal quantity of sugar should be delivered in satisfaction, and a *distringas* was authorised to be used to enforce its delivery; *Held*, that the *distringas* could only have been used to coerce the specific performance of the contract, and that, when that could no longer be accomplished, it should have been revoked. *Ib.*

DOMICIL.

1. The domicil of a citizen is in the parish in which he has his principal establishment, which is that in which he habitually resides; and if the place of his principal establishment be uncertain, by reason of his residing in different places, without any formal declaration of intention as provided by law, and under circumstances which render his residence equivocal, either of the places where he so resides may be considered as that of his principal establishment, at the option of those whose interests are thereby affected. C. C. 42. *Cole* v. *Lucas*, 946.

2. In a strict legal sense, that is properly the domicil of a person where he has his

true, fixed, and permanent home and principal establishment, and to which, when absent, he intends to return. *Ib.*

3. A domicil once acquired remains until a new one is acquired, *facto et animo*. *Ib.*

4. One going to another State for health, pleasure, or any temporary purpose, with the intention of returning, has a mere transitory residence, which constitutes no new domicil, nor an abandonment of the old one. It is not the act of inhabitance which constitutes the domicil, but the fact, coupled with the intention, of remaining. *Ib.*

5. In cases of doubt, the original domicil is considered to be the true one. *Ib.*

6. In questions of domicil the declarations of the party whose domicil is in dispute are entitled to weight, only when made previously to the event which gave rise to the suit. *Ib.*

DONATIONS AND TESTAMENTS.

I. *Donations Inter Vivos.*

1. Every condition attached to a donation must be so performed, as it is probable that the parties intended it should be performed. C. C. 2032. *Duclaud* v. *Rousseau*, 168.

2. In the interpretation of donations, words must be understood according to their usual signification and popular use; and where the intention of the partles is doubtful, the doubt must inure to the benefit of the donee. C. C. 1940, 1952. *Ib.*

3. A donation *inter vivos* of moveables or immovables must be executed before a notary and two witnesses, under pain of nullity. C. C. 1525. This is the only nullity of form declared by law, and no other can be recognised. By the Code of 1808, a detailed estimate of the effects given was required to be inserted in, or annexed to, the act of donation, under pain of nullity; but the law was changed by the Code of 1825. The last paragraph of art. 1525, providing that "the act of donation ought to contain a detailed estimate of the effects given," is directory to the notary who executes it, and its omission may make him liable for any damage the parties may sustain in consequence thereof, or subject him to any penalty imposed by law for such neglect of duty, but cannot annul the act. *Soileau* v. *Rougeau*, 766.

4. Where a donation *inter vivos*, though styled by the donor a remunerative donation, does not exceed the disposable portion, the heirs of the donor cannot dispute his estimate of the value of the services. *Per Curiam:* The donation may be treated as an ordinary one; the announcement of the donor's motive cannot affect it. *Miller* v. *Andrus*, 767.

5. A concubine can receive as a donation from her paramour, in moveables, but one-tenth of the value of his whole estate. *Cole* v. *Lucas*, 946.

6. A slave can receive nothing by donation. *Ib.*

7. Where one who had been a slave claims a donation of notes, alleging that she had been emancipated, it is incumbent on her to show that the donation was made and the notes transferred subsequently to the act of emancipation. Mere possession of the notes is not evidence of the time when they were delivered. *Ib.*

II. *Testaments.*

1. *Form and Validity.*

8. Testamentary dispositions, made by a husband in favor of his wife, when he leaves a child at the time of his death, are governed by art. 1739 of the Civil Code. Art. 1480 does not apply to donations between married persons. Art. 1739 embraces testamentary dispositions, as well as donations *inter vivos*. *Depas* v. *Riez*, 30.

9. Art. 1745 of the Civil Code applies to testamentary dispositions. *Ib.*

10. The provision of art. 1745 of the Civil Code, which authorizes one who contracts a second or subsequent marriage, having a child by a former one, to give to the other spouse only the least child's portion, and that only as an usufruct, and which declares that the portion, of which the donee is to have the usufruct, shall in no case exceed the fifth part of the donor's estate, extends to all the property of which the donor may die possessed, whether brought by him into marriage, or subsequently acquired. *Ib.*

11. Where a posterior testament contains no disposition from which a change of intention in the testator, with regard to a legacy in a prior will, can be presumed, the legacy will not be revoked. C. C. 1683, 1684, 1686. *New Orleans* v. *Fisk*, 78.

12. Where a testator dying in another State, possessed of slaves there, directs that, if either of his two sons to whom his property had been bequeathed, "should die without a lawful heir, his part, real and personal, shall go to the survivor," and one of the sons receives his portion of the slaves and removes with them into this State, and dies without issue, the survivor cannot recover them, nor their increase here. The clause on which plaintiff's claim rests, though it might confer a title on the survivor by the laws of the State where the testator died, as it creates a substitution, cannot be enforced here. Such a testamentary disposition cannot operate on property within this State. Code of 1808, b. 3, tit.

2, ch. 4. C. C. 1507. *Harper* v. *Stanbrough*, 377.

13. Donations of moveables to a concubine are valid, but they may be reduced to one-tenth of the value of all the property left by the testator. C. C. 1468. *Olivier* v. *Blancq*, 517.

14. Where a testator, after making various dispositions in a will in which he evidently intended to dispose of his whole property, declares as follows: "I give the rest and residue of my estate to my brother, and the legal heirs at law of my deceased wife, in equal proportions; this residue, if any shall remain after the payment of debts and legacies, will consist in notes due me at New Orleans, the joint property of the estate of myself and my late wife"—the words "this residue, &c., will consist in notes due me at New Orleans, &c.," being mere words of description, will not be considered as limiting the generality of the phrase, "rest and residue of my estate," to notes due to the testator at New Orleans. *Clark* v. *Preston*, 580.

15. Where the language of a testament leaves the meaning of the testator doubtful, acts done by him after its execution may be taken into consideration, as explanatory of his intentions. C. C. 1708. *Ib.*

16. A nullity of form in a testament may be cured by lapse of time, or by voluntary execution or ratification on the part of the heirs of the testator; and even if enforced, leaves them under a natural obligation to execute the will. C. C. 3507, 1751. *State* v. *Martin*, 667.

17. A blind person may make a valid olographic testament. *Ib.*

18. Natural incapacities, such as the alleged incapacity of a blind person to make an olographic will, are not questions of law, but matters *en pais*, dependent on the circumstances of each case. *Ib.*

19. Where parties attack a will on the ground that it contains a tacit *fidei-commissum*, it is not indispensible, under the rule of the civil law, that they should establish a pact between the testator and the legatee; it is enough that they establish, with certainty, by direct or circumstantial evidence, the intention of the testator that the legacy, or a part of it, should enure to the person for whose benefit the *fidei-commissum* was established, and that the instituted heir has discovered that intention, and has executed, or intends to execute it. *Ib.*

20. The fisc cannot annul a testament for defects of form, although the heirs may do so. *Ib.*

21. The decree of a Probate Court, ordering a will to be executed, does not amount to a judgment binding on those who are not parties to it; and when the will is offered as the title in virtue of which property is claimed or withheld, its validity may be inquired into. The admission of a will to probate, and the order for its execution, are mere preliminary proceedings, necessary for the administration of the estate. *Per Curiam:* Nor are we prepared to say that the mere order of a judge for the execution of a will, has the effect of a judgment binding on those at whose instance it was made, so far as to conclude them from subsequently contesting the validity of the will, unless, at the time of the probate, its validity was expressly put at issue. *Sophie* v. *Duplessis*, 724.

22. The only requisites for the validity of a nuncupative testament under private signature are prescribed by arts. 1574, 1575 of the Civil Code. It is not necessary to the validity of such a testament, that it should be dated, or should mention the place at which it was executed. The date and place of execution may be shown by evidence at the time of its probate. *Ib.*

23. It is not necessary that a nuncupative will under private signature should exhibit on its face, evidence that all the formalities essential to its validity have been complied with. It is unnecessary to mention in such a will the fulfilment of any formalities; it is sufficient to establish, when the will is offered for probate, by evidence *dehors* the instrument, that the formalities required by law have been observed. It is not even necessary that the names or places of residence of the witnesses to such a will should appear in the instrument. *Ib.*

24. A testator bequeathed to the corporation of a city "a settlement consisting of one thousand *arpents* of land, with the appurtenances and improvements thereon, and all the personal estate thereto belonging and thereon remaining, including thirty slaves and their increase; directing that no part thereof should be sold or disposed of for twenty years after his death, should B. survive him and live so long, but said settlement to be kept up by B. for said term of years as if it were his own, that is, to remain under his sole care and control, all the nett profits thereof to be enjoyed by B. for his own use; he rendering annually an account to the city of the state of the settlement, showing its income and expenses, the number and increase of the slaves, and its nett profits; the testator further directed that, at the end of said twenty years, or at the death of B. should he not live so long, the land, improvements, slaves, and other appurtenant personal property, should be sold as soon as the corporation deemed it advisable; the proceeds to be applied by the corporation to

such uses as it might deem most beneficial to the inhabitants:" *Held*, that the ownership of the property was given to the city, and the usufruct to B.; that the occurrence of circumstances preventing the establishment from being kept together, will not terminate the usufruct; that the language of the will is merely descriptive of the property, and not restrictive of its future use, pre-supposing the employment of the slaves on the land, but not imposing it as a condition of the usufruct; and that the fact of such employment becoming impossible, or so onerous and inconvenient as to make it unreasonable to exact it, could not deprive the usufructuary of the fruits of the ordinary labor of the slaves elsewhere than on the land. *Girard* v. *New Orleans*, 897.

See FATHER AND CHILD, 3.

2. *Executors.*

25. Where an executrix has paid debts due by the succession, though without authority, she will be entitled to credit for the amounts so paid. *Depas* v. *Riez*, 30.

26. An executrix who fails to deposit in bank the money of a succession, as required by sec. 3 of the stat. of 13 March, 1837, must be dismissed from office, on proof thereof made in the manner prescribed by that section. *Ib.*

27. In a proceeding by a creditor, who had obtained judgment against a succession represented by executors, instituted against the latter in the Probate Court, to compel them to sell sufficient property to pay his claim and to file an account, proof that their accounts had been homologated, and a judgment rendered discharging them, and authorising the delivery of the estate to the widow and heirs, where the application of the executors was never advertised, and the proceedings were *ex parte* as to the creditors, having been carried on between the executors and the widow and heirs alone, will not authorize the dismissal of the proceedings at the cost of the creditor, though, by the recovery of a judgment against the widow and heirs in a suit against them instituted subsequently to the commencement of the proceedings in the Probate Court, the controversy is important only so far as the costs are concerned. *Ingram* v. *Moore*, 870.

28. A pledge of negotiable instruments belonging to a succession, made by an executor without being expressly authorised in the manner prescribed by law, will be without effect where the holder is the party to whom they were pledged by the executor. C. C. 3115. *Boyce* v. *Escoffie*, 872.

29. The Probate Courts, under the late judicial system, were authorised, on an opposition to an account presented by an executor, to condemn him to pay to the succession, out of his own property, the amount of any debt due to the estate, which he had failed to collect through culpable negligence, (C. P. 993, 997, 1053, 1057); he being chargeable with all sums due to the succession which he has failed to collect, unless he show a sufficient excuse for his failure. Such a proceeding is not to be confounded with an action against an administrator on his bond, or for a *tort*, when the claim against him is a personal one. *Succession of Glover*, 4.

30. Where an executor obtains a judgment against a debtor of his testator with a stay of execution, due diligence on his part requires that the judgment should be recorded immediately, and that an execution should be issued as soon as the delay has expired. It is for him to show any reason which might render such steps unnecessary. *Ib.*

31. Any creditor may oppose the homologation of an account presented by an executor, and may, without making the other creditors parties to the proceeding, obtain a judgment condemning him to pay, for the benefit of the succession, the amount of a debt due to it, which the executor fails to show that he has used due diligence to collect. *Ib.*

EVIDENCE.

See CRIMINAL LAW, V.

I. *When to be Introduced.*

1. When from inadvertence, or other cause, a plaintiff has failed to offer all the evidence on which he relies for a recovery, it is discretionary with the judge, even after the evidence for the defence has been closed, to permit the deficiency to be supplied, where the evidence offered is not of a character to surprise the opposite party. *Le Blanc* v. *Nolan*, 223.

II. *How Excepted to.*

2. No notice will be taken on appeal of reservations of all legal exceptions, made in regard to testimony taken out of court. *Curtis* v. *Woodman*, 309.

III. *Onus Probandi.*

3. A sale *omnium bonorum* is not a contract in the usual course of business, and, when it is assailed, parties claiming under it are bound to establish its reality by proper evidence. *Scott* v. *Rusk*, 266.

4. In all cases, however summary, the

plaintiff must prove his allegations, or he cannot recover. *State* v. *Briscoe*, 383.

5. Proof that the amount of a note sued on had been attached by a third person in the hands of defendant, will not throw upon the plaintiff the burden of showing that the attachment has been discharged. The defendant must prove that it is still in force, if he desires to avail himself of it. *Bacon* v. *Smith*, 441.

6. Where a party claims her freedom under the provisions of a will, she must show that it has been properly admitted to probate, and its execution legally ordered, on proof of its having been made in the form and manner required by law. Where the evidence shows that the will was submitted to probate on insufficient proof, but there is no proof that it is defective from the omission at the time of making it, of any formality essential to its validity, there will be only a judgment of nonsuit, as the plaintiff may still be able to supply the defect of proof. *Sophie* v *Duplessis*, 724.

See 67, *infra*. SALE, 74, 75.

IV. *Presumption.*

7. Where an injunction has been obtained to arrest an execution, but the want of the notice of seizure required by art. 654 of the Code of Practice is not made one of the grounds of injunction, and no evidence in relation to it appears in the record, the officer charged with the execution of the order of seizure will be presumed to have done his duty. *Dunlap* v. *Sims*, 239.

8. Where litigants withhold the evidence by which the nature of their case would be manifested, every presumption to their disadvantage will be adopted. *New Orleans Draining Co.* v. *De Lizardi*, 281.

9. In the absence of evidence to the contrary, it will be presumed that payment was made by the party bound, and not by another. *Amis* v. *Merchants Insurance Company*, 594,

10. In questions of title silence does not, in any case, show consent, unless continued during the time necessary for prescription. *McIntosh* v. *Smith*, 756.

11. Where two witnesses, of unimpeached veracity, contradict each other, the presumption of truth is in favor of the one who swears affirmatively. *Hepburn* v. *Citizens Bank*, 1007,

See 59, 61, 66, 67, 72, *infrâ*. BILLS OF EXCHANGE, &c. 43.

V. *Best Evidence.*

12. Where the vendors of a steamer intervene in an action by an attaching creditor, claiming to be paid, by preference out of the proceeds of the sale, the amount of notes secured by a deed of trust on the steamer, the production of the notes and deed of trust is indispensable to the establishment of their claim. An endorsement on the enrollment declaring the existence of the deed of trust and the date and amount of the notes, and the recital of the deed in the act of sale to the defendant in attachment, are not sufficient against third persons. *Cammack* v. *Griffin*, 175.

13. The proof of loss which will authorise the introduction of inferior evidence, must depend on the particular circumstances of each case. *Sexton* v. *McGill*, 190.

14. Where the subscribing witness to an instrument resides out of the State, the signature of the party by whom the act was executed may be proved by other witnesses. *Ib.*

15. The return of the sheriff on a subpœna taken out for a subscribing witness to an instrument, that, after diligent search and enquiry, no person of that name could be found in the parish, is not sufficient to authorise proof of the signature of the party by whom the act was executed. *Per Curiam:* The degree of diligence to be used in the search for subscribing witnesses to private acts is the same as that required in the search for a lost paper. It must be a strict, diligent and honest enquiry and search. *Ib.*

16. The fact that the subscribing witnesses to an act *sous seing privé* reside out of the State, will not dispense with the necessity of proving the signature, or ordinary mark, of the party. Proof of the signature of the subscribing witnesses is not enough. C. C. 2241. *Harris* v. *Patten*, 217.

17. It is a general principle of evidence that, the best evidence must be produced which the nature of the case admits of. *Isabella* v. *Pecot*, 387.

18. An account rendered, or a letter written, to a party to a suit by his agent, is inadmissible in an action against a third person, to prove payments made by the principal, where the agent is alive and within the State. His testimony must be procured personally or under a commission. *Groves* v. *Steel*, 480.

19. In the absence of any evidence of the recognition by the government of the United States of a state of war, as existing between a foreign government and an insurgent province, the rights of the latter as a belligerent cannot be admitted. *Per Curiam:* The proceedings of courts in such cases depend entirely on the action of the general government. *Dimond* v. *Petit*, 537.

20. Where the fact of the purchase of

certain property by the plaintiff appears to have been conceded throughout the proceedings, and the answer of a witness to an interrogatory propounded by the defendant positively establishes it, the evidence of title will be sufficient against the defendant in a case where the question of title is merely incidental. *Ledoux* v. *Cooper*, 586.

21. Where a lost instrument is made the foundation of a suit or defence, the loss must be shown by direct evidence, or be rendered probable by circumstances, supported by the oath of the party; and it must be shown that its loss was advertised in some public paper. C, C. 2258, 2259. *Lewis* v. *Splane*, 754.

22. Where the endorser of a note, after discharge, gives a written promise to pay the debt, and the note and written promise are subsequently lost, no recovery can be had but upon proof that the loss of the written promise had been advertised within a reasonable time, and proper means taken to recover possession of the instrument. It is not enough that the loss of the note was duly advertised. C. C. 2259. *New Orleans and Carrollton Railroad Co.* v. *Armstrong*, 829.

23. Where one of two witnesses to an act *sous seing privé* is proved to be dead, and the other to have become disqualified, since he attested the act, by marriage with one of the parties interested under it, the instrument will be admitted in evidence on proof of the signatures of the witnesses. *Robinett* v. *Compton*, 846.

24. Declarations of a person examined as a witness in a cause, made under oath while testifying as a witness for one of the defendants in another cause, are inadmissible. The party against whom the testimony is offered cannot be deprived of the right of cross-examining the witness as to the facts sworn to on another occasion. *Reynolds* v. *Rowley*, 890.

25. A report of experts, to whom an account sued on had been referred, not homologated, and which appeared to have been abandoned by both parties, should not be allowed to go to the jury. *Ib.*

26. Parol evidence will be received to prove a resolution of a board of directors authorising the president to execute a mortgage in the name of the corporation, when the witness, who was secretary of the board, states that the resolution was written by him as secretary on a slip of paper, and never transcribed on the minute book, that the paper was lost, and that an unsuccessful search had been made for it. *Prothro* v. *Minden Seminary*, 939.

27. Where a person of color offered as a witness is objected to as incompetent on the ground of his being presumed to be a slave, and it appears from evidence presented by the party by whom the witness was introduced that he had been emancipated by a notarial act, the witness will not be permitted to testify on the statement of another witness that he had formerly owned the person objected to, and had emancipated him a few years before. The production of the written act of emancipation, if insisted on by the opposite party, could not be disposed with, nor be supplied by secondary evidence without proof of the loss or destruction of the written instrument. *Roebuck* v. *Curry*, 998.

VI. *Relevancy and Admissibility under Pleadings.*

28. In an action against the owners for the value of certain services alleged to have been rendered to a steamer, evidence is admissible, under the general issue, to show that, at the time of rendering the services, the steamer was chartered to a third person. The defence set up is not an exception. *Pontchartrain Railroad Company* v. *Heirne*, 129.

29. The plaintiffs in an action on a bill of exchange will not be allowed to establish a special agreement with the drawer, inconsistent with the allegations of their own petition. *Benoist* v. *Reyburn*, 137.

30. Where, in an action for the price of land, defendant resists payment on the ground of the existence of a servitude which had been fraudulently concealed from him, alleging it to have been created by public act, passed before a certain notary at a particular date, he may offer in evidence, as proof of the servitude, an act under private signature, of the same date and recorded in the office of the same notary. The evidence will not be excluded for such an inaccuracy in the description of it. *Lejeune* v. *Hebert*, 145.

31. Although in actions of trespass the enquiry is restricted exclusively to the questions of possession, and of the damages resulting from the injury complained of, yet, where the defendant asserts an adverse possession, the title under which he holds is admissible in evidence in support of that possession. This production of title does not authorise an adjudication upon the question of property, but is admissible to show the beginning and extent of the possession. *Le Blanc* v. *Nolan*, 228.

32. In an action against a defendant to render her liable personally, and as tutrix of her minor children, for a debt due by the community which existed between her and her late husband, on the ground that she had accepted the community, and had rendered

herself liable, personally and as tutrix, by disposing of effects of the succession and paying its debts without observing the forms of law, where it is shown that the defendant had ceased to act as tutrix, the action against her as tutrix must be dismissed; but the plaintiff should be permitted to show that the defendant had accepted the community, either expressly or by acts of ownership, and thereby rendered herself liable for one half of its debts. C. C. 2387. *Monget* v. *Pate*, 485.

33. In an action by a factor against his principal for compensation, evidence is admissible on the part of plaintiff to establish a custom among merchants alleged in the petition. *Per Curiam:* As a fact, it was competent to plaintiff to establish the custom; its effect, is a different matter. It may well be supposed that the parties contracted, with reference to the usual course of the business which was the subject of their agreement. *Thompson* v. *Packwood*, 624.

34. Time will not be allowed to a party to obtain the answers of his opponent to interrogatories, when, even if taken for confessed, the facts they might establish would be impertinent to the issue. C. P. 350. *Kenner* v. *Peck*, 936.

VII. *Competency.*

35. Where the result of an action in favor of the party by whom a witness was offered, would render the witness liable to the opposite party for a certain sum, but if unfavorable would subject him to a much larger debt to the party by whom he was introduced, his interest is not equal, and his testimony should be disregarded. *Murray* v. *Gibson*, 311.

36. In an action by a tutor to annul the release of a mortgage in favor of his minors, made in fraud of their rights by a former tutor, the latter is a competent witness for the plaintiff, to prove that no money was received by him in discharge of the debt due to the minors, although its receipt has been acknowledged by him in an authentic act. *Per Curiam:* The necessity of the case which admits agents as witnesses for their principals, is equally applicable to tutors, when called to establish facts the knowledge of which rests with them alone. *Kemp* v. *Rowley*, 316.

37. In an action by the holder against the endorser of a note, the maker is generally a competent witness for the endorser; but not where the note was endorsed by the latter for the accommodation of the maker. In such a case he is not indifferent, being liable for the costs in the case of judgment against the endorser; but not liable, if in his favor. C. C. 2260. *Union Bank* v. *Jones*, 345.

38. Where the property in controversy in a petitory action is proved to be in the possession of the wife of a person offered as a witness for the defendant and of a third person, who cultivate it together, and it is shown that the witness controls and ships the crops, he will be incompetent. *Per Curiam:* A husband cannot be a witness either for or against his wife. C. C. 2260. *Beard* v. *Morancy*, 347.

39. A mother is incompetent as a witness for or against her daughter (C. C. 2260); but her evidence is admissible in favor of her son-in-law; her credibility, as affected by her connection with him, being a proper subject for the consideration of the jury. *Groves* v. *Steel*, 480.

40. Where a witness will be equally responsible however the case may be determined, he is competent; his interest being balanced. *Dowell* v. *Dawson*, 495.

41. Where the declarations of a witness are the only evidence of his having been interested, and those declarations establish the release of that interest, they must be taken together as proving his competency. *Cavelier* v. *Moss*, 584.

42. In an action to render a defendant liable for goods sold to a partnership of which it is alleged that he was a member, another partner is incompetent as a witness for the plaintiff, to prove the partnership. The witness is interested to charge the defendant. *McIlvain* v. *Franklin*, 622.

43. A defendant, who is a mere nominal party, having no interest in the event of the suit, may be examined as witness against her co-defendants. *Reynolds* v. *Rowley*, 890.

44. One who sues as executor, and who declares that he has no personal in the case, is competent as a witness. *Parker* v. *Moore*, 1017.

See Attorney at Law, 4, 5.

VIII. *Commission.*

45. Evidence taken under a commission cannot be excluded on the ground of its not having been taken in conformity with arts. 425, 426, 427, 428 of the Code of Practice, and of the witness' being interested, where the counsel of the opposite party was present at the taking of the deposition, and cross-examined the witness, who, in the course of his cross-examination, swore that he was disinterested. *Succession of Segond*, 138.

46. Where the testimony of a witness was taken under a commission, on account of her infirmity and inability to attend the trial, and a rule, taken on the opposite party, under the stat. of 20 March, 1839, s.

17, to show cause why the testimony should not be read, returnable on the day of trial, was made absolute without opposition on that day, but before the trial commenced, the testimony cannot be objected to on the ground that the witness was really able to attend. *Groves* v. *Steel*, 480.

47. Where interrogatories to be propounded to a witness under a commission are submitted to the opposite party, and the latter propounds no cross-interrogatories, but writes at the foot of the plaintiff's interrogatories "legal objections reserved," the reservation will authorise an objection afterwards to the admissibility of the evidence on the ground of interest in the witness. *McIlvaine* v. *Franklin*, 622.

See CONTINUANCE, 1, 2.

IX. *Rebutting Evidence.*

48. Where a paper signed by a third person, and other acts of his, and hearsay evidence of conversations with him, have been offered in evidence by a party, other statements made by him, though not under oath, and made out of the presence of the party against whom they are offered, are admissible in evidence to discredit the writings and statements first introduced. *New Orleans Draining Co.* v. *De Lizardi*, 281.

X. *Foreign Laws.*

49. The court will judicially notice the fact that, the common law is the basis of the jurisprudence of the State of Mississippi. *Copley* v. *Sanford*, 335.

50. The court will not require the provisions of the common law on any subject to be proved as facts by the testimony of witnesses, but will ascertain for itself what that law is, by the examination of commentaries on it. *Ib.*

51. Where a witness is introduced by a party to prove the law of a foreign country, the opposite party may require that he shall be first asked, whether the law, as to which he is about to testify, is written or unwritten. If he answers that the law is unwritten, his testimony will be admissible to prove what it is; if written, an authenticated copy of the law, or at least a copy proved to be a true copy by a witness who has examined and compared it with the original, can alone be received. *Isabella* v. *Pecot*, 387.

52. A book purporting to contain the statutes of another State, not authenticated according to the act of Congress of 26 May, 1790, is inadmissible to prove a statute of that State. But the printed statutes of a State produced from the office of the Secretary of this State, and proved to have been received by the executive of this State from the executive authority of the State whose laws they purport to be, will be received as *primâ facie* evidence of the statutes contained in it. *Phillips* v. *Murphy*, 654.

53. Parol evidence is inadmissible to prove a foreign statute. *Ib.*

54. A duly authenticated copy of the section of a foreign statute on which a party relies, is sufficient. If the opposite party have reason to believe that other provisions of the statute are favorable to him, he must produce them. If surprised by the introduction of the extract only in evidence, the court will, on a proper showing, grant time to produce the entire statute. *Sullivan* v. *Williams*, 876.

55. A printed book, purporting to contain the statutes of another State, and to have been printed by the authority of its legislature, not authenticated according to the act of Congress of 26 May, 1790, is inadmissible to prove a statute of that State. *Huestón* v. *Jones*, 937.

XI. *Judicial Records and Proceedings.*

56. Where a case has been submitted to amicable compounders by an agreement filed among the records of the court, it will be conclusive evidence of the terms of the submission. *Per Curiam:* The records and minutes of a court are the highest and best evidence of its proceedings. *Driggs* v. *Morgan*, 151.

57. The oath of a subscribing witness, attesting the execution of a bond by which the obligor bound himself to make a good title to certain land, taken before the parish judge by whom the bond was recorded, is, *primâ facie*, sufficient proof of its genuineness. *Sexton* v. *McGill*, 190.

58. In an action for damages for a malicious prosecution, instituted against plaintiff on a charge of stealing a slave, the testament of a person by whom the slave was devised to plaintiff's wife, and proceedings had in the court of probates by the defendant as co-tutor of other minor heirs of the testatrix, and other proceedings connected with the administration of the succession of the testatrix, are admissible in evidence to show want of probable cause for the prosecution. *Per Curiam:* It devolved on the plaintiff to show malice; a fact which is usually inferred from the want of probable cause for the prosecution. *Behrnes* v. *Coxe*, 472.

59. After the lapse of twenty years a probate sale will not be annulled, on an allegation that the judgment ordering the sale was rendered without the citation or appointment of an attorney to represent the absent heirs, supported by the evidence of

a judge of the court, subsequently appointed and then in office, that he had examined the records without being able to find the appointment of an attorney to represent the absent heirs, or any citation issued, before the judgment ordering the sale, to any one purporting to be the attorney of such heirs. *Per Curiam:* The ground taken goes to charge the curator and the court with culpable neglect of duty, and it must be proved by the party maintaining it, though involving a negative. In the remote parishes of this State, for the want of suitable buildings and suitable keepers, proper care has not been taken of judicial records; many have been entirely lost, and, in many cases, those which remain are incomplete; and if the validity of titles acquired under judicial sales within the last forty years were to be tested by the judicial records in existence at any subsequent period, time, instead of healing, as it should, the defects of those titles, would gradually weaken, and eventually destroy, them. The presumption *omnia rite acta*, which attaches to judicial proceedings, is not to be rebutted by the remote presumption resulting from the evidence adduced in this case. *Gibson* v. *Foster*, 503.

60. Where the transcript of a record from a court of another State, commences as follows: "Pleas before the Hon. G. C., Judge of the First Judicial District of the State of M., at a Circuit Court begun and held at the court-house in and for C. county," &c.; and the clerk, in his certificate, describes himself as Clerk of the Circuit Court for the county of C.; and the judge, in a certificate commencing "State of M., C. county," styles himself Judge of the First Judicial District of said State, an objection that the certificate of the judge does not show that the county of C. was within his circuit, will be disregarded. *Newman* v. *Goza*, 642.

61. In the absence of any suggestion that the certificate of a judge, authenticating the transcript of a record from a court of another State, and attached thereto, at the foot of the clerk's certificate, by a wafer, was improperly obtained, it will be presumed that the judge did not violate his duty, and that he affixed the certificate himself to the transcript; nor will this presumption be affected by the fact that there was room enough to have written the judge's certificate on the same sheet on which the clerk's certificate was written. *Ib.*

62. A judicial record from another State is sufficiently authenticated, when, by a reference to the record itself, taken in connection with the certificate of the judge, there is evidence to show that the person by whom the certificate was given was the judge of the court from which the record was certified. *Per Curiam:* It is not necessary that the judge should repeat in his certificate what his very act implies. *Newman* v. *Goza—Re-hearing*, 646.

63. In a suit for freedom against the heirs of a succession, plaintiff offered in evidence as an acknowledgment of her right to recover, an act of partition, signed by some of the defendants, but not by all, and which was not signed by the parish judge. The only clauses in the act intended for the benefit of the plaintiff, purported to be donations made to her of certain undivided interests in the succession, for the purpose of enabling her to acquire her and her children's freedom. *Held*, that the act being invalid as a donation (C. C. 1523), even if in other respects binding on the parties who had signed it, cannot conclude the defendants. *Sophie* v. *Duplessis*, 724.

64. Where the record of a judicial partition from another State, properly authenticated, is offered in evidence, any objection to it as not being a complete transcript of all the proceedings, or on the ground that the partition is of no effect, not having been homologated, goes to its effect and not to its admissibility. *McIntosh* v. *Smith*, 756.

65. An allegation, in the answer of a defendant in a petitory action, calling a third person in warranty and disclaiming any title to the property in contest, is not evidence, as against the plaintiff, of possession in the party cited in warranty. To enable the warrantor to avail himself of any legal rights dependent on his possession, it should be established affirmatively as a substantive fact. *Tulane* v. *Levinson*, 787.

66. The return of a sheriff or other ministerial officer, in relation to sales made by him under execution, is *primâ facie* evidence between the parties. The presumption of law is in favor of the legality of their proceedings; but, like other presumptions, it must yield to contrary proof. *Robinett* v. *Compton*, 846.

67. Where a purchaser produces a judgment, execution, and a sale made to him under it, this is *primâ facie* sufficient, and all previous proceedings will be supposed to be correct; the burden of proof will be on the party attacking them. *Ib.*

68. A judgment obtained against a party on the ground of his illegal interference with the administration of plaintiff's property while the latter was a minor, which allowed a tacit mortgage on the property of the party against whom it was rendered from the date of the interference, not alleged to have been obtained by fraud or collusion, will be *primâ facie* evidence, that the sum claimed was due and that it was secured by a tacit mortgage, in an action

against a third person to enforce its execution on property held by the latter, alleged to have been acquired from the defendant in the first suit while subject to the tacit encumbrance recognised by the judgment obtained against him. But where the rate of interest allowed by the original judgment is higher than the law authorises, the judgment will be enforced against the property in the hands of the third possessor only for the amount for which it should have been rendered. *Turner* v. *Luckett*, 885.

69. Where an incidental contest arose, in the progress of an action for the settlement of a partnership, as to the payment of a note to a receiver appointed by the court, which was cumulated with the main action, but had no connection with the other matters in contest, an extract from the record, containing all the proceedings relative to the note, will be admissible in evidence, though objected to as not being a complete transcript of all the proceedings in the case, where the whole would have been attended with heavy expense, and the nature of the case shows that there was no necessity for producing the whole record. *Per Curiam:* In mortuary and insolvent proceedings, which are frequently voluminous, and in which all incidental contests are cumulated, the production of the entire record has never been required in practice, and we know of no reason why it should be. *Succession of Stafford*, 886.

70. A copy of the *procés-verbal* of a sale made by a probate judge, is evidence of the sale. *Reynolds* v. *Rowley*, 890.

71. The testimony of a witness who resides out of the State, taken on a former trial, is admissible in evidence. *Per Curiam:* It would be oppressive to require his testimony to be taken anew at every trial. *Ib.*

72. Where the certificate of the clerk, appended to a transcript of the record of an action in another State, states that the document "is a full and complete transcript of the record and proceedings, executions and returns thereon, except the two first executions, which have not been returned," and it appears from the transcript itself that two other executions were issued subsequently to those stated not to have been returned, it will be presumed that the fact of the two first executions not having been returned was no obstacle to issuing the two last, and that the latter were issued according to the laws and practice in the State in which the judgment was rendered, and the transcript will be admitted in evidence. *Bank of Alabama* v. *Livingston*, 915.

XII. *Non-judicial Records, and other Official Instruments.*

73. A survey made by a parish surveyor under an order of court, and proved by the officer who made it, will be presumed to be correct, until the contrary is shown. *Jewell* v. *Perche*, 168.

74. A paper purporting to be the copy of the record of an act of sale *sous seing privé*, is inadmissible in evidence to prove title to real estate, where no proof of the verity of the act was exhibited to the recording officer at the time of recording it, and there is no sufficient proof of its being a copy of the original. *Briggs* v. *Phillips*, 303.

75. A copy of a clearance granted to a coasting vessel at another port in the United States, certified by the deputy collector, under the custom-house seal, to be a true copy of the original on file in his office, is admissible and sufficient evidence to establish the date of the clearance, when accompanied by the testimony of a clerk in the custom-house of the port for which the vessel was cleared, that the person by whom the certificate was signed was, at the date of the certificate, the acting deputy collector, that the seal was the custom-house seal, and that a search had been made for the original clearance, and that it could not be found; and by that of another witness, that he had seen the original on file in the custom-house of the port for which the vessel was cleared, and that the signature to it was the genuine signature of the person who was deputy collector. *White* v. *Kearney*, 639.

76. Where the law declares that the term of an office, to which the appointment is made by nomination by the executive and confirmation by the Senate, shall expire on a certain day, but authorises the officer to hold over until his successor is appointed, and the re-nomination of the incumbent rests in the discretion of the executive, and no particular mode is prescribed by law by which the unwillingness of the executive to re-nominate the incumbent shall be manifested, an office-copy of a written communication, addressed to the auditor of auction sales by the secretary of the governor, informing him of the appointment of a person in the place of the former incumbent, accompanied by the testimony of the secretary that the communication was written by him under the orders of the governor, will be sufficient evidence of the appointment of another to the place of the former incumbent. The fact that the governor directed the communication to be written, may be proved by parol. *Florance* v. *Richardson*, 663.

XIII. *Private Writings.*

77. A receipt *sous seing privé* has no date as to third persons, without proof of the time of its execution. *Murray* v. *Gibson*, 311.

XIV. *Parol Evidence as affecting Written Instruments, and Proof of Fraud.*

78. Parol evidence is admissible to prove that an authentic act, attesting the cancelling of a lease and the payment of rent, was executed through error, caused by the fraud of one of the parties. Art. 2256 of the Civil Code, which forbids parol evidence to be received against or beyond what is contained in certain written acts, applies only to contracts relating to real estate. Other acts are subject to the general rules of evidence, which permit mistakes, or fraudulent omissions, to be proved. *Akin* v. *Drummond*, 92.

79. Where the affairs of a partnership formed for the purposes of planting were exclusively managed by one of the partners, who also acted as an overseer of the plantation, his failure to keep any regular account of his receipts and expenditures, will not be regarded as a badge of fraud, the education of such persons not generally qualifying them to do so. *Richardson* v. *Pumphrey*, 448.

80. Fraud may in all cases be proved by parol. C. C. 1842. *Morris* v. *Terrenoire*, 458.

81. Parol evidence is admissible in favor of one, not a party, nor representing a party, to a sale of land, to prove that the consideration of the sale was different from that stated in the written act. *Groves* v. *Steel*, 480.

82. The declarations of a vendor, made shortly before and after a sale, though out of the presence of the vendee, acknowledging its simulation, are admissible against the latter, to prove fraud in the vendor; but such evidence is insufficient in itself to establish fraud in the vendee. *Ib.*

83. The evidence of a single witness is sufficient, in an action by the holder against the maker of a note for an amount exceeding five hundred dollars, to defeat a recovery on the ground that plaintiff is a fraudulent holder. Art. 2257 of the Civil Code is inapplicable to such a case, which must be governed by the general rules of evidence. *Palmer* v. *Dinn*, 536.

84. In an action by a creditor to annul a contract made in fraud of his rights, the record of an action in which he had obtained a judgment against the original debtor is admissible in evidence as *primâ facie* evidence of the claim, though the defendant was not a party to the action; but the latter may contest the demand of the plaintiff, though liquidated by a judgment, in the same manner that the debtor might have done before the judgment; and it is his duty to do so. C. C. 1971. *Per Curiam:* The cases in which it has been held that the burthen of proof is on the judgment creditor, are those in which wives have obtained judgments against their husbands. They are exceptions to the general rule, that whoever alleges fraud must prove it. *Lanata* v. *Planas*, 544.

85. Where the words of a receipt leave its meaning doubtful, the testimony of witnesses is admissible to explain it. *Copley* v. *Benton*, 590.

86. Parol evidence is admissible to contradict or add to the stipulations in a written contract for the sale of land, where the party offering it alleges that the land described in the contract was not that which he intended to purchase, and that it was fraudulently substituted by the vendor for the latter. *Per Curiam:* The admission of parol evidence for such a purpose, to defeat written contracts, is a rule of universal jurisprudence. *Williams* v. *Vance*, 908.

87. Parol evidence of declarations of a mortgagee is admissible to establish the fraudulent character of a mortgage, when offered by one not a party to the act. The weight to be given to such proofs, goes to the effect, and not to the admissibility of the evidence. *Succession of Harkins*, 923.

88. If a creditor of a succession choose to show that he has combined with the administrator to injure other creditors, no rule of law will prevent him from doing so, nor the creditors from availing themselves of the legal consequences in their favor. *Ib.*

XV. *Of Marriage.*

89. The testimony of a single witness, that he knew a person as a married woman for a few months before her death, in a neighborhood into which she had lately removed a stranger from another State, is insufficient to prove her marriage. *Per Curiam:* Her *status* cannot be proved by the general reputation of that neighborhood; and we are not prepared to say that, where the proof of legitimacy is introduced for the purpose of acquiring property of great value, a single witness is sufficient to prove a marriage, by reputation. *Jones* v. *Hunter*, 254.

90. In an action for damages for slander in asserting that plaintiff was living in concubinage with a person represented to be his wife, proof by plaintiff of cohabitation and reputation as husband and wife is sufficient evidence of a marriage. *Hobdy* v. *Jones*, 944.

XVI. *Of Parties.*

91. Where a party requires his adversary to answer interrogatories or to produce a book in open court, the day on which the interrogatories are to be answered, or the book produced, must be fixed by the judge, and notified to the party. C. P. 351. Fixing the day of trial as that on which the answers are to be given or the book produced, is not a sufficient designation of the day, unless ascertained with certainty in the order notified to the party. Nor is the usual weekly notice posted in the court-room, of the days for which the cases are fixed, sufficient. *Per Curiam:* Whenever an act is to be done by a party personally, which cannot be done by his counsel, he is entitled to a special notice of the order, and of the particular day on which he is required to comply with it, before he can be deemed to be in default. *Spears* v. *Nugent*, 11.

92. Where a party to an action resides out of the parish in which the court is held, his adversary cannot compel him to bring his commercial books into court. In such case the party might be interrogated and required to annex to his answers copies of his accounts, or a commission might be taken out to take the testimony of witnesses by whom the books could be examined and sworn copies made from them; or it might be required that the books should be produced before the commissioners, and the authenticity of the books and the correctness of the copies thus ascertained. It would be the duty of the party, under the order of the court, to give every facility for such an examination of his books. *Cooper* v. *Polk*, 158.

93. Allegations in a petition, signed by one as the attorney of a third person, inconsistent with claims set up by him in an action in his own name, commenced on the same day, will estop him from recovering. *Farrar* v. *Stacy*, 210.

94. Where a party is present at the trial he may be ordered to answer interrogatories *instanter*, though then propounded to him for the first time, where the questions require no recourse to books or papers. *McIntosh* v. *Smith*, 756.

95. Answers to interrogatories on facts and articles can only be used against the party interrogated, and not against other parties to the action; the latter have a right to insist on a cross-examination of the witness by whose testimony they are to be bound. *Johnson* v. *Marsh*, 772. *Morrill* v. *Carr*, 807. *Sullivan* v. *Williams*, 876.

96. Where a party is required to answer interrogatories in open court, a day must be appointed for that purpose, and he must be notified thereof unless present at the trial or when the order was made; or, in case of failure to answer, he cannot be considered in default, nor can the interrogatories be taken for confessed. C. P. 351. *Weathersby* v. *Huddleston*, 845.

97. In answer to an interrogatory whether "payment of the note sued on had not been demanded since maturity", propounded to a defendant with reference to a question of costs dependent upon an amicable demand before suit, the latter cannot state in his answer matters striking at the foundation of the action and the validity of the contract out of which it originated. *Williams* v. *Vance*, 998.

XVII. *Of Agents.*

98. Acknowledgements and declarations by a person who had been an agent of the party against whom they are offered, made after his agency had ceased, are inadmissible. *Reynolds* v. *Rowley*, 890.

99. Admissions of any fact, made by an agent during the continuance of his agency, relating directly to the business entrusted to him, are binding on the principal, particularly if the fact so admitted be a thing done by the agent himself, or within his own knowledge. *Ib.*

100. An entry made in a bank-book of a certain amount to the credit of the depositor, if made at the time of the deposit, by a clerk authorized to make the entry, in the absence of proof of any fraud or collusion between the clerk and the depositor, is conclusive on the bank, which will be estopped from alleging that the entry was erroneously made; but where the book is written up afterwards, the entry is not an original one, and may be examined into. *Hepburn* v. *Citizens' Bank*, 1007.

XVIII. *Of Third Persons under a Fi. Fa.*

101. The right given by the 13th section of the stat. of 20th March, 1839, to a plaintiff who has applied for a *fi. fa.*, to propound interrogatories to third persons, believed to have property or effects under their control belonging to the defendant, or to be indebted to him, can be exercised only while the writ remains in the hands of the sheriff. *Copley* v. *Fretwell*, 310.

102. Plaintiff, who had applied for a *fi. fa.* against a defendant, propounded interrogatories to a third person under the provisions of sec. 13 of the stat. of 20 March, 1839, for the purpose of ascertaining whether he had in his possession any real or personal property belonging to defendant, or was in any manner indebted to him. The answers to these interrogatories were traversed, and a rule taken on the respondent to show cause why judgment should not be rendered against him for the amount of the

plaintiff's claim. On the trial of the rule objection was made to proceeding until plaintiff declared in writing, specifically, what property he expected to prove to be in possession of the party interrogated, when the court ordered the plaintiff to specify "what *real estate or slaves*" he intended to prove to be in the hands of the party interrogated, belonging to the defendant. The specifications filed by plaintiff not being considered a compliance, on motion of the party interrogated, the proceedings were dismissed. On appeal: *Held*, that the only effect of the non-compliance with the order to specify, would be to exclude any evidence as to the subjects embraced by it—real estate and slaves; that in relation to personal property and debts, the order was inoperative; and that the proceedings should not have been dismissed. *Florance* v. *Yorke*, 995.

103. Where one to whom interrogatories are propounded under sec. 13 of the stat. of 20 March 1839, for the purpose of ascertaining what property he may have in his possession belonging to a defendant against whom an execution has been taken out, objects to the mode of proceeding, he should make such objections appear by exception or plea. *Ib.*

XIX. *In Actions on Bills of Exchange and Promissory Notes.*

See Bills of Exchange, &c. VII.

XX. *In Actions against Sheriffs.*

104. In an action by a policy jury against a sheriff to recover the amount of taxes on suits placed in his hands for collection, plaintiffs are not bound to show the amount actually collected by him, as the measure of his liability. On proof by plaintiffs that, the lists of suits on which taxes were due were delivered to him as required by law, it is for him to account for the amount, and show that, though due dilligence has been used by him, he has been unable to collect. *Police Jury* v. *Hébert*, 149.

105. In proceedings against a sheriff, to render him liable under the 7th sec. of the stat. of 7th April, 1826, for failure to return a *fi. fa.* on or before his return day, he may show any circumstance which will legally excuse his failure to return the writ before that time; and where the written return on the writ is offered in evidence by the plaintiff, the facts which it recites will be evidence for the defendant. *Webb* v. *Kemp*, 370.

See Appeal 43, 49, 66.

EXCEPTION.

See Pleading, VI.

EXCEPTIONS, BILL OF.

It is within the discretion of the judge who tries a case, to determine whether the trial shall be delayed until a bill of exceptions can be drawn up and signed. *Per Curiam:* All that the party who excepts has a right to require on the trial is, that the point reserved, or decision excepted to, be reduced to writing by the court, and that a bill of exceptions may be drawn up and signed afterwards. C. P. 488, 489. *Thompson* v. *Packwood*, 624.

See Criminal Law 18.

EXECUTION OF JUDGMENT.

See Appeal, 51, 52. Evidence, 101, 102, 103, 105. Sale, VIII. 72, 75. Sheriff, 2, 3, 4, 5, 6, 8.

I. *Form of Fi. Fa.*

1. In issuing execution on a twelve-months' bond given for the price of property sold under a *fi. fa.*, it is not required that the writ should be issued against the principal and surety in the bond, nor that it should be stated in the body of the writ, that it was issued for the amount of a twelve-months' bond entered into by the principal and surety for the purchase of the property sold. It is sufficient that the writ direct the sheriff to seize and sell the property of the parties to the bond, and that the clerk endorse on it that it was issued on a twelve-months' bond, and that the property is to be sold for whatever it will bring in cash. C. P. 719, 720, 721. The style of the original suit should be preserved in the writ. *Dunlap* v. *Sims*, 239.

2. Where a judgment was rendered for a certain amount, subject to a credit, and the credit instead of being written in the body of the *fi. fa.*, was endorsed on it, in a certificate of the clerk under the seal of the court, the error, if it be one, is no ground for enjoining the execution for its whole amount. *Rowley* v. *Kemp*, 360.

3. The seal of the court is essential to the validity of an execution; without it a sheriff has no authority to act. There is no difference between a decree for the seizure and sale of mortgaged property and an ordinary decree, as to the necessity for issuing a writ of execution. *Bonin* v. *Durand*, 776.

II. *Seizure of Property.*

4. Where a plantation on which an order of seizure and sale has been levied, is in possession of a lessee, the sheriff is not authorized to appoint a guardian or keeper for its

management and preservation, and consequently can make no charge for the services of such a person, if one be appointed by him. *Decoux* v. *Bank of Louisiana*, 157.

5. A sheriff is entitled to be reimbursed all expenses incurred by him for the preservation of slaves seized under an order of seizure and sale, including compensation for the services of a keeper employed to take care of them on the plantation on which they were at work. Stat. 10 March, 1845, s. 2. *Ib.*

6. A sale under a *fi. fa.* of a promissory note, never in the actual possession of the sheriff, confers no title on the purchaser. To make a valid seizure of tangible property, the thing levied upon must be taken into actual possession by the officer. *Fluker* v. *Bullard*, 338.

7. Where notes offered in evidence before their maturity, have been withdrawn, by permission of the court on leaving certified copies of them in the record, the levying of a *fi. fa.* upon the copies of the notes and notice to the maker, will not constitute a legal seizure. *Galbraith* v. *Snyder*, 492.

8. A bond can be legally seized by a sheriff only by his obtaining actual possession of it. A purchaser at a sheriff's sale made without a previous seizure, acquires nothing. *Offut* v. *Monguit*, 765.

9. To make a valid seizure of a promissory note under a *fi. fa.*, the sheriff must take actual possession of the note. *Taylor* v. *Stone*, 910,

See 15, *infrâ*.

III. *Injunction.*

10. The fact of an execution being issued for more than the amount due under the judgment, will not authorize an injunction for the whole amount. *Rowley* v. *Kemp*, 360.

11. A *fi. fa.* levied on an undivided half of a tract of land cannot be enjoined by the owner of the other half, on the ground of his having a privilege thereon for the price of a levée made on the land under an adjudication by the inspector of roads and levées, nor on account of a claim for the increased value of the property from useful improvements while plaintiff in injunction was a possessor of the land in good faith. If entitled to a privilege for the cost of the levée, the party has a right to be paid by preference out of the proceeds of the sale of the property seized; but if he has only a claim for the increased value of the property resulting from useful improvements, a separate appraisement of the land and improvements should be made after the sale; and the seizing creditor will be entitled to receive the value which the land bears to the product of the sale, and the plaintiff in injunction the value of the improvements, estimated in relation to the same product; the rents of the property since the notice of seizure, to be added to the share of the seizing creditor, and deducted from plaintiff's. *Brown* v. *Bemiss*, 365.

See Courts, 10. Evidence, 7.

IV. *Sale.*

12. A sale of property under execution, on a twelve-months' credit, neither satisfies the judgment nor novates the debt. *Dunlap* v. *Sims*, 239.

13. Where a sheriff has made a seizure under a *fi. fa.*, he is not bound to return the writ, unless required to do so by the plaintiff. He may sell under the seizure even after the return-day, where the failure to sell before is not attributable to the plaintiff. *Rowley* v. *Kemp*, 360.

14. Slaves seized under an order of seizure and sale against an absentee, must be sold at the seat of justice of the parish, or at some other public place in its vicinity. C. P. 664. Stat. 5 March, 1842, s. 1. *Duke* v. *Routh*, 385.

15. A sheriff by whom services had been rendered, before the stat. of 10 March, 1845, relative to fees, in writing notices of the sale of property seized under execution, in posting them, and in applying to the judge for mortgage certificates, is entitled to a reasonable compensation therefor, to be fixed by the rate allowed for similar services in other cases. The fact that no allowance is made for those services by the stat. of 28 March, 1813, is no proof that the legislature intended that they should be gratuitous, the statute requiring them to be rendered having been enacted since the statute of 1813, No charge can be made for services which were required to be performed before the stat. of 1813, and for which no allowance was made by it, as for notices of seizure, copies thereof, and mileage for serving them. Ss. 3, 17 of act of 1813. The first sec. of the stat. of 7 March, 1814, allowing mileage for the service of process, does not authorize any charge for mileage in serving notices of seizure. The service of a notice of seizure is not the service of process within the meaning of that statute. *Dwight* v. *Curtis*, 752.

16. A purchaser of property sold under execution for cash at the suit of a bank, cannot require the sheriff to receive in payment notes and bonds of the bank. *Per Curiam:* The mandate of the court required him to receive the lawful money of the United States. He was incompetent to determine judicially the genuineness and validity of the obligations, or to settle the rights of the

parties as mutual debtor and creditor. *Osburn* v. *Curtis*, 764.

17. In all forced alienations of property under the authority of judicial proceedings, all the delays and formalities required by law must be strictly complied with, under pain of nullity. *Robinett* v. *Compton*, 846.

18. A sale of immovable property made under execution, on the *thirtieth* day after the advertisement thereof, was legal under sec. 14 of the stat. of 25 January, 1817. *Per Curiam:* The rule adopted at that time in computing time, was to exclude one day and include the other. *Robinett* v. *Compton*, 846.

19. Without a previous seizure, no adjudication can be made by a sheriff under a *fi. fa.* *Taylor* v. *Stone*, 910.

EXECUTOR.

See Donations and Testaments, II.

EXECUTORY PROCESS.

I. *Form and Mode of Proceeding.*

1. In proceedings *viâ executivâ* it is not necessary to serve the defendant with a copy of the petition; and the Code of Practice, art. 734, expressly dispenses with any citation. The notice required by arts. 735, 736, is not a citation, but is in the nature of a notice of judgment; and no law requires it to be served in the french language, even when that is the mother tongue of the party to be notified. *Aillet* v. *Henry*, 145.

2. Proceedings *viâ executivâ* cannot be changed into an action *viâ ordinariâ*, without the assent, express or implied, of the seizing creditor. Where such a change is made with the assent of the creditor, neither the interest nor damages allowed on the dissolution of an injunction can be recovered. *Chambliss* v. *Atchison*, 488.

3. Interventions are not allowed in proceedings *viâ executivâ*. Third persons must assert their rights in a direct action. *Ib.*

4. In proceedings *viâ executivâ* no citation is necessary. The proceedings are *in rem*, and notice of the order of seizure and sale is all that is necessary to be given to the debtor. *Dupuy* v. *Bemiss*, 509. *Broughton* v. *King*, 569.

5. In proceedings *viâ executivâ* the creditor must bring himself within the letter of the law. *Robb* v. *Potts*, 552.

6. Where a mortgage creditor proceeds by an order of seizure and sale, citation of the debtor is unnecessary. Before the adoption of the Code of Practice it was not necessary to take out an execution under an order of seizure. The sheriff served the order itself on the party in possession. Code of 1808, b. 3, tit. 19, art. 43. *Broughton* v. *King*, 569.

II. *On Foreign Judgments.*

7. The provisions of the Code of Practice, art. 746 *et seq.*, authorising the summary execution of foreign judgments, must be construed strictly. *Dunlap* v. *Hundly*, 212.

8. An order of seizure and sale, obtained on a foreign judgment purporting to have been rendered on the confession of the defendant made through his attorney, will be enjoined, where the transcript of the foreign record has a suspicious appearance on its face, and where, though the plaintiff in injunction denied under oath the authority of the attorney to confess a judgment for him, and swore that he never abandoned his defence, no evidence is offered to disprove his allegations. *Ib.*

9. Allegations in a petition for an injunction against an order of seizure and sale issued on a foreign judgment, that the petitioner was not cited in the foreign tribunal, and that the attorney who entered an appearance and filed an answer for him had no authority to do so, are sufficient grounds for relief. *Wood* v. *Henderson*, 220.

10. On an application for executory process on a foreign judgment, which is silent as to interest, plaintiff cannot, by producing an authenticated copy of a statute of the State in which the judgment was rendered authorising execution to issue on such a judgment for the principal with interest at a certain rate, obtain an order of seizure and sale for more than the principal sum. The court cannot look beyond the foreign record itself. *Per Curiam:* A proceeding by which the property of a party is summarily seized and sold, without citation, is one of great severity, and cannot be extended beyond the cases for which it was expressly and clearly provided. *Spencer* v. *Knowland*, 222. *Scott* v. *Niblett*, 270. *Chambliss* v. *Atchison*, 488.

11. An order of seizure and sale cannot be issued on a judgment, rendered in another State against a defendant, who appeared, but did not plead. A judgment so rendered is a judgment by default. *Duke* v. *Routh*, 385.

12. A judgment of another State cannot be rendered executory here, where the transcript of the record shows that a *fi. fa.*, issued on the judgment in the State in which it was rendered, had been levied upon property, but does not show what dispo-

sition was made of it. *Bank of Tennessee* v. *McKee*, 461.

See APPEAL, 10.

III. *On Conventional Mortgages.*

13. Where several notes, payable at successive periods, and secured by the same mortgage, have all matured, the holder of those which matured the last may obtain an order for the seizure and sale of the property, without proving that the other notes have been paid. If unpaid, the fact should be shown, when the holders may claim to participate in the proceeds of the mortgaged property. *Armor* v. *Downes*, 242.

14. To entitle the holder of the notes secured by mortgage to proceed by executory process, the identity of the notes with those secured by the mortgage must appear upon the face of the record; though, it may be true, that the certificate and *paraph* of the notary are not indispensable for that purpose. *Chambliss* v. *Atchison*, 488.

15. A judgment having been obtained against the owner of a city lot, in proceedings instituted by one of the municipalities of New Orleans, under the stat. of 3 April, 1832, for the opening of a street, establishing the amount of his contribution, defendant purchased the lot, and assumed to pay the judgment in favor of the municipality, putting himself in the place of his vendor. Plaintiffs having become subrogated to the rights of the municipality, took out an order of seizure and sale against the property. *Held*, that defendant, in assuming the debt, merely put himself *personally* in the place of his vendor; that plaintiffs can enforce against him only the mortgage which existed on the property at the time of his purchase, and that that must be done *viâ ordinariâ*; that if the claim, on which the order of seizure and sale was obtained, still belonged to the municipality, it could not, under the act of 1832, resort to proceedings *viâ executivâ*, without having previously passed a resolution requiring the issuing of the process by the court in which the assessment was confirmed; and that the right to proceed *viâ executivâ*, even after passing such a resolution, is personal to the corporation, and cannot be transferred to its creditors. *Robb* v. *Potts*, 552.

EXPERT.

See EVIDENCE, 25.

FAMILY MEETING.

See TUTORSHIP, I.

FATHER AND CHILD.

1. Though by the laws of the State in which the minors reside, their father cannot become their tutor or guardian, and consequently cannot receive property belonging to them in this State, he may take all the steps necessary for its preservation; he may have any claims due to them liquidated, and the amount brought into court, and invested for their benefit. C. C. 348. *Fisk* v. *Fisk*, 71.

2. A son cannot recover from the succession of his mother any compensation for services rendered by him during his minority, as an overseer on an estate belonging to the community, in the absence of proof of any promise of payment by the head of the community; nor will an acknowledgment of his claim made by the mother, after the death of the father, be binding on her, or on her heirs. *Per Curiam:* For the services rendered by the son during the minority there could be no debt, and the acknowledgment of a debt which had no existence, is not binding on the mother or her heirs. *Ledbetter* v. *Ledbetter*, 215.

3. In the event of a difference between the parents as to the marriage of a minor child, the authority of the father prevails (C. C. 234); and he may disinherit the child, for marrying without his consent. *Bosworth* v. *Beiller*, 293.

FIDEI-COMMISSUM.

See DONATIONS AND TESTAMENTS, 19.

FRAUD.

See EVIDENCE, 78 to 84, 86, 87, 88.

GARNISHEE.

See ATTACHMENT, V.

HUSBAND AND WIFE.

See MARRIAGE.

HYPOTHECARY ACTION.

1. A transferree of a mortgage executed to secure the endorsers of a note, cannot proceed against the mortgaged property in the hands of a third person, where there is no proof that the endorsers had paid any part of the note, nor that the succession of the mortgagor was insolvent. *Amonett* v. *Fisk*, 263.

2. Where, in an hypothecary action against a third possessor of property mortgaged to secure the payment of a note, defendant expressly denies that any amicable demand was made of the original debtors thirty days before suit, as required by law, the testimony of a witness that he went to the residence of the original debtors for the purpose of demanding payment, that he found the house closed and no one there, and that he enquired for, but could not find either of them, is not evidence of due diligence, and cannot excuse the want of amicable demand. *Per Curiam:* Nothing shows that the debtors were not at their house the next day, nor that they could not have been found in the neighborhood. *Robin* v. *Flower*, 731.

See MORTGAGE, 31, 34. PRESCRIPTION, 30. SALE, 38.

IMPUTATION OF PAYMENT.

See PAYMENT, III.

INDICTMENT.

See CRIMINAL LAW, II.

INJUNCTION.

1. Where, on an appeal from a judgment perpetuating an injunction staying the execution of a judgment, the record does not state the amount of the judgment enjoined, nor the rate of interest which it bore, no additional interest can be allowed on reversing the judgment below and dissolving the injunction. *Macarty* v. *New Orleans Theatre Company*, 46.

2. Where a judgment, the execution of which has been enjoined, bears interest, such additional interest only can be allowed, on dissolving the injunction, as will make the rate allowed equal to the highest conventional interest. *Aillet* v. *Henry*, 145.

3. An injunction obtained by the plaintiff, in an action for a trespass on land, will not be perpetuated on the testimony of a witness that defendant had said that he would trespass on plaintiff's land, where no actual trespass is established. *Woods* v. *Kirkland*, 337.

4. Where judgments for sums of money are enjoined, the measure of damages is established by the third section of the stat. of 25 March, 1831; but where the judgment is for the delivery of specific property, the amount of damages is a question of fact, to be ascertained in an action on the injunction bond. *Nolan* v. *Babin*, 357.

5. The statutes of 25 March, 1831, s. 3, and of 29 March, 1833, s. 3, are imperative as to the condemnation of the plaintiff and surety to the payment of "interest at the rate of ten per cent a year on the amount of the judgment," on the dissolution of an injunction arresting the execution of a judgment. The court has no discretion as to the allowance of interest. *Barrow* v. *Bank of Louisiana*, 453.

6. Where a party ordered to give security before taking out execution, executes a bond, with surety, for a certain sum, but, on an objection to the bond as not for a sufficient amount, executes a second bond, with the same obligors, for a further sum, the mere fact that two bonds were given instead of one, will not authorise an injunction. *Dwight* v. *Carson*, 459.

7. Grounds for enjoining an order of seizure and sale may be noticed on appeal, though not set out in the petition for the injunction, when apparent on the face of the record. Not to notice such grounds, would be inconsistent with the rule that injunctions, though improvidently sued out, are never dissolved, when the facts show that, on the dissolution, the party will be immediately entitled to that remedy on other grounds. *Per Curiam:* The case of *Landry* v. *Leglise*, 3 La. 220, must be considered as referring exclusively to points not made in the petition for the injunction, nor appearing on the face of the record. *Chambliss* v. *Atchison*, 488.

8. A District Court having jurisdiction over the place where an execution is levied may enjoin the execution, though the domi- of the party at whose instance it was issued be in another parish. *Galbraith* v. *Snyder*, 492.

9. Informalities in a seizure may be considered on the trial of an injunction to arrest it, though not set forth in the petition for the injunction. *Ib.*

10. Where a judgment pronounced by the Supreme Court is absolute and unconditional as to the matters which it professes to decide, its execution cannot be enjoined by a party, while litigating other matters in controversy, which the judgment had reserved. *Henderson* v. *Wilcox*, 502.

11. An injunction obtained against an order of seizure and sale should not be perpetuated for the whole amount claimed by the seizing creditor, where a part of the claim is justly due. He is entitled to proceed with the sale for the amount really due. C. P. 743. *Murphy* v. *Maskell*, 763.

12. Where the burning of a brick kiln, erected near a dwelling, would expose the latter to danger from fire, besides seriously incommoding the occupants, the burning of the kiln may be prevented by injunction. *Fuselier* v. *Spalding*, 773.

13. Under sec. 3 of the stat. of 25 March, 1831, fees of counsel may be allowed to the defendant on dissolving an injunction, without proof of their having been actually paid by him, where they do not exceed twenty per cent of the amount of the judgment enjoined, and no other damages are allowed. *Per Curiam:* The judge is authorised, on the dissolution of the injunction, to allow damages to the amount of twenty per cent on the judgment enjoined, without proof. *Brown* v. *Lambeth*, 822. *Farrar* v. *New Orleans Gas Bank*, 873.

See Appeal, 8, 23. Execution of Judgment, III. Privilege, 11.

INSOLVENCY.

1. Where a statute directs that the salaries of the commissioners for the liquidation of a bank shall not, after its passage, exceed a fixed sum, the court may, on the suggestion of counsel, amend a tableau of distribution in which the commissioners have allowed themselves a larger sum, by reducing the allowance, though no opposition was made to the allowance by any creditor of the bank. *Matter of Merchants Bank*, 68.

2. The second section of the stat. of 6 April, 1843, reducing the compensation allowed by sec. 25 of the stat. of 14 March, 1842, to the commissioners appointed under that act, did not impair any contract. The 25th section of the act of 1842, allowing such compensation, created no contract with the commissioners. *Ib.*

3. A right to be paid by preference out of the property of an insolvent, must be established contradictorily with the other creditors. *Nimmo* v. *Allen*, 451.

4. The question as to which of two creditors of an insolvent is entitled to be paid by preference out of the proceeds of property sold by the syndic, must be litigated on the filing of a tableau of distribution; the matter cannot be determined by an opposition to an account filed by the syndic. *Robert* v. *Creditors*, 535.

5. In the distribution of insolvent estates, no distinction is recognised among creditors dependent on the place of origin of the debts. The distribution is made as of the proceeds of a common pledge, according to the order of privileges and mortgages established by the Civil Code. *Lee* v. *Creditors*, 599.

6. Decision in *Nicholson, syndic*, v. *Chapman*, 1 Ann. Rep. 222, affirmed. *Nicholson* v. *Jacobs*, 666.

7. Sec. 24 of the stat. of 14 March, 1842, relative to the liquidation of banks, giving to the commissioners appointed under the statute the powers of syndics, has never been considered as placing the stock mortgages under the control of the commissioners. *Meeker* v. *Clinton and Port Hudson Railroad Co.*, 971.

8. In homologating a tableau of distribution presented by a syndic of the creditors of an insolvent, the decision of the court upon each claim is a separate judgment belonging to the party in whose favor it is rendered, and binding upon all who do not appeal from it; and where one creditor alone appeals from the judgment of homologation, the other creditors must be viewed as strangers to the proceeding, and unaffected by any judgment rendered on the appeal. *Lee* v. *Creditors*, 994.

See Appeal, 28, 41. Bills of Exchange, &c., 5, Marriage, 14. Prescription, 34.

INTEREST.

See Bills of Exchange, &c., 51. Executory Process, 10. Injunction, 1, 25. Loan. Mandate, 7, 9, 11, 18, 19, 20. Obligations, 6, 7, 8, 9, 10, 11, 17, 22. Offences, &c., 7. Partnership, 3. Quasi-Contract, 1. Sale, 33, 37, 40.

INTERPRETATION.

Definitions incorporated in a Code must be construed with reference to its positive enactments *in pari materiâ*, and have no meaning beyond them. *Depas* v. *Riez*, 30.

See Donations, 1, 2, 15. Executory Process, 7. Judgment, 16. Obligations, V.

INTERROGATORIES.

See Attachment, 17, 18. Evidence, 34, 91, 92, 94, 95, 96, 97, 101, 102, 103.

INTERVENTION.

See Appeal, 5, 16. Executory Process, 3. Pleading, IX.

JUDGMENT.

1. A judge must, in all cases, assign the reasons on which his judgment is founded, or it will be null; but the omission to refer to the particular law in virtue of which it is rendered, will not render it null. Const. art. 70. *Fleury* v. *Murphy*, 59.

2. Where, in an action against the surety

of a tutor, plaintiffs rely on a judgment obtained by them against their tutor, defendant may establish the nullity of the judgment so obtained. *Gilbert* v. *Meriam*, 160.

3. It is no objection to a judgment rendered by a Court of Probates, that the judge, in signing it, annexed the words "Parish Judge" to his name. The discharge of the duties of judge of the Probate Court is part of the functions of the parish judge. *Johnson* v. *Hamilton*, 206.

4. Where no issue has been joined, nor judgment by default taken, no judgment can be rendered against the defendant. *New Orleans and Carrollton Railroad Co.* v. *Patton*, 352.

5. The correctness of a judgment adjudicating community property to a surviving spouse, rendered by a court of competent jurisdiction, in the absence of any proof of fraud or spoliation, cannot be enquired into collaterally. *Sanders* v. *Carson*, 393.

6. Where a judgment has been rendered between proper parties, and by a court of competent jurisdiction, the truth of the facts upon which it rests cannot be inquired into collaterally. *Bryan* v. *Atchison*, 462.

7. A judgment allowing a fee to counsel appointed by the court to represent an absentee, is a nullity. No action is necessary to have it declared so. Const. art. 71. C. C. 12. *Galbraith* v. *Snyder*, 492.

8. Where judgment has been pronounced by a District Court, no other District Court has jurisdiction of an action to annul it. C. P. 608. *Ib.*

9. Where an injunction, obtained by a party claiming to be the owner of certain slaves against an order of seizure and sale, has been dissolved, no appeal being taken from the judgment; and, on the removal of the slaves to another parish, and their seizure under a *fi. fa.* issued from the court by which the injunction was dissolved, the same party obtains a second injunction, claiming to be their owner and relying on the title held by her at the time of the first injunction, the second injunction will be dissolved, with damages; and irregularities in the order of seizure and sale, not urged on the trial of the first case, will not be noticed. *Osburn* v. *Planters Bank*, 494.

10. Previous to the promulgation of the Code of Practice, and the repeal of the spanish laws by the stat. of 25 March, 1828, s. 25, the fact of the judge being interested in the event of a suit did not render the judgment a nullity. Unless the judge was recused on the oath of a party, it was his duty to decide the cause. 3 Part. tit. 4, l. 22. *Gibson* v. *Foster*, 503.

11. Judicial proceedings before a competent tribunal will not be treated as nullities for defects of form only, but in cases expressly provided for by law, or within the legal intendment of art. 12 of the Civil Code, as fixed by the jurisprudence of the country from which that article was adopted. *Ib.*

12. Where a sale has been made by order of a court, whose jurisdiction over the subject matter appears on the face of the proceedings, errors or mistakes committed by it cannot be corrected or examined when brought up collaterally. *Dupuy* v. *Bemiss*, 509.

13. Where in an action on a note, by an administrator against a third possessor of property mortgaged to secure its payment, the latter, through error, confesses judgment for the whole amount, the fact of a partial payment made by the makers of the note not having been communicated to him, the judgment will be void to the extent of the error; but the creditors and heirs of the deceased, represented by the plaintiff, not having been instrumental in producing the error, will be entitled to the benefit of the judgment for the amount really due. *McElrath* v. *Dupuy*, 520.

14. A judgment is not conclusive against persons, neither parties, nor privies to it. *Succession of McNeil*, 167.

15. A judgment by default made final in eight days after service of citation, must be reversed. *Williams* v. *Dunn*, 806.

16. Where, in an action against beneficiary heirs, judgment was rendered against them "as the children of the said R. W. deceased," the whole context of the judgment must be considered in interpreting it; and where, so interpreting it, its legal effect is that of a judgment against them to be satisfied out of their patrimonial estate, it will be considered as such. *Ingram* v. *Richardson*, 839.

17. A judgment of non-suit will not support a plea of *res judicata*. *Lynch* v. *Kitchen*, 843.

See DONATIONS, &c. 21. EVIDENCE, 68. PRESCRIPTION, 16, 31. SUCCESSIONS, 22.

JURY.

1. A person having been objected to on account of his exemption as a school commissioner from liability to serve as a juror, waived his privilege, and was sworn. After the pannel had been formed, on being asked a question by defendant, he stated that he did not like to serve, as he felt interested in the case, and that he did not know the nature of the case when he was objected to. *Held*, that the juror was properly discharged, and another sworn in his place. *Edwards* v. *Farrar*, 307.

2. An objection that the sum for which a

verdict is found in an action for damages is expressed in figures, is too late after appeal. If it be a defect, it is one which might have been corrected on the trial below, at the request of either party. C. P. 528. *Behrnes* v. *Coxe*, 472.

3. A prayer for a trial by jury is not too late, though made after the case had been set for trial and continued, if it be not actually fixed for trial at the time of the prayer. The object of art. 495 of the Code of Practice is to prevent a cause from being delayed, by interposing a prayer for a jury after it has been set for trial on a particular day. *Louisiana State Bank* v. *Duplessis*, 651.

4. Where, by agreement of counsel, a jury is permitted to separate after the adjournment of the court, the defendant cannot complain that, after having sealed their verdict as directed by the court, the jurors separated for the night, and that, after their verdict was delivered into court the next morning, they were sent out again, with the papers of the suit, to make the verdict more explicit. *McIntosh* v. *Smith*, 756.

5. The verdict of a jury on a question of fact will not be interfered with, unless it be contrary to the evidence, or violate some rule of law. *Dunbar* v. *Bullard*, 810.

6. A defendant cannot deprive a co-defendant of the right to challenge a juror peremptorily. *Reynolds* v. *Rowley*, 890.

See Criminal Law, IV.

LAW.

1. Where a statute expressly provides that it shall have effect from its passage, it will have effect from that date, and not from the time of its promulgation only. *Matter of Merchants Bank*, 68.

2. Every government has the right to establish and regulate the rights of property in things within its jurisdiction, in such manner as the public interest may require. *Harper* v. *Stanbrough*, 377.

3. Where a judgment of the highest tribunal of another State, has declared a statute of that State to be unconstitutional, the question of its constitutionality will be regarded as settled. *Planters Bank* v. *Bass*, 430.

4. The provision of art. 12 of the Civil Code that, whatever is done in contravention of a prohibitory law is void although the nullity be not expressly declared, is taken from the 5th law, of the 14th title, of the 1st book of the Justinian Code, and must be interpreted in connection with another rule, adopted in the jurisprudence established under that Code, that *Multa fieri prohibentur, quæ si facta fuerint obtinent firmitatem*. *Gibson* v. *Foster*, 503.

5. A nation within whose territory personal property is found, has as entire jurisdiction over it while there, as it has over immovable property. Its exercise, for all purposes, is a question of policy. *Lee* v. *Creditors*, 599.

6. Municipal councils, or other functionaries of government, cannot renounce the powers vested in them by the constitution and laws. An ordinance of a municipality which makes even a partial surrender of political power is null. *Third Municipality* v. *Ursuline Nuns*, 611.

See Criminal Law. Evidence, X. Obligations, 29.

LEASE.

1. Improper behaviour on the part of an overseer, in the use of abusive language and threats of violence towards others in the service of his employer, will authorise his immediate discharge, without rendering his employer liable for his wages for the whole term for which he was engaged. *Youngblood* v. *Dodd*, 187.

2. Where a party contracts with another to accompany her to this country, and to assist her in recovering an inheritance, for a certain sum to be paid out of it, and the former complies with his part of the agreement, but soon after his arrival here, and before the recovery of the inheritance, is discharged by his employer, without cause, he may demand at once, and without waiting for the recovery of the inheritance, the whole amount to which he would be entitled had he continued in her service until the expiration of the stipulated term. C. C. 2720. *Angelloz* v. *Rivollet*, 651.

3. Before the promulgation of the Code of Practice, an action against a lessee did not terminate by the defendant's citing his lessor in warranty; but the only question which could be tried between the plaintiff and defendant, after the lessor had been cited and made default, was that of possession. *Robinett* v. *Compton*, 847.

See Privilege, 23. Shipping. Surety, 3.

LITIGIOUS RIGHT.

See Sale 41, 42, 43, 44.

LOAN.

1. A note discounted by a bank at the highest rate of interest allowed by its charter, for the benefit of the maker, to whom the

proceeds were paid, will, if unpaid at maturity, bear the same rate of interest from that time till payment. *Bank of Louisiana* v. *Wilcox*, 344.

2. The nullity resulting from a stipulation for usurious interest attaches to the agreement for interest only, and does not destroy the obligation for the principal. *Hynes* v. *Cobb*, 363.

3. An agreement to pay the highest rate of conventional interest upon a nominal principal, part of which was composed of usurious interest, is usurious. *Ib.*

4. Where a party has stipulated, in a note, for usurious interest after maturity, he cannot recover legal interest even from judicial demand. *Ib.*

5. The small excess of interest gained in calculations of interest, by considering the year as consisting of only 360 days, is not usurious. *Planters Bank* v. *Bass*, 430.

6. Where by making a loan in depreciated bank notes to be repaid at their par value, the effect of the contract will be to enable the lender to obtain more than legal interest, the contract is usurious. *Commercial Bank* v. *King*, 487.

7. The effect of a stipulation for usurious interest must be determined by the law of the place where the contract was made. *Ib.*

8. Where a higher rate of interest than eight per cent a year has been paid, the whole amount paid as interest may be recovered within twelve months from the time of payment. Stat. 19 Feb. 1844. *Barrett* v. *Chaler*, 874.

LOST INSTRUMENTS.

See Bills of Exchange, &c., 22, 23, Evidence 13, 21, 22, 26.

MANDAMUS.

1. Whether a decree, from which a suspensive appeal is prayed for, be a new judgment changing the legal rights of the parties as fixed by a former judgment, or be merely declaratory of the legal effect of the first judgment, is a question which cannot be determined on a rule to show cause why a mandamus should not be directed to the inferior court commanding it to allow an appeal; it can only be determined when the case comes up on the appeal. *Little* v. *Consolidated Association*, 731.

2. A mandamus will not be issued in any case, where the party applying for it has a full and adequate remedy by appeal. *Succession of Macarty*, 979.

See Courts G.

MANDATE.

I. *Different Kinds.*

1. The product, or substitute of a thing, follows the nature of the thing itself, so long as it can be ascertained to be such. So the property of a principal, entrusted to a factor for a special purpose, is considered still to belong to the principal, notwithstanding any change of form it may have undergone, so long as it can be identified. *Bloodworth* v. *Jacobs*, 25.

2. To bind another by a note the power must be express and special. *Nugent* v. *Hickey*, 358.

3. A power of attorney authorised the attorney to collect debts, give acquittances, compound, compromise, &c.; "for and in the name of the principal, to sign any bond, obligation, contract, or agreement, or other paper whatsoever; to draw and endorse promissory notes; to draw and accept bills of exchange"; to buy and sell all kinds of property; "and, for the principal and in his name to do all such other acts, matters and things in relation to his property, estate, affairs, and business of every kind or nature whatsoever, as he might or could do if personally present and acting therein: it being his intention to commit to said attorney the entire management, care, and disposition of his property and affairs, as fully and absolutely as he has now the management, care and disposition of them, and that this power should be understood and taken in its most comprehensive sense:" *Held*, that the power was sufficient to authorise the attorney to waive notice and protest of notes endorsed by the principal. *Union Bank* v. *Morgan*, 418.

4. A special power to do acts not coming under the denomination of acts of administration, need not state the specific acts to be done. *Reynolds* v. *Rowley*, 891.

See Act Sous Seing Prive.

II. *Obligations of Principal.*

5. Where the conduct of the principal is calculated to interrupt the friendly relations existing between him and his agent, the latter may terminate his agency under a full reservation of all his rights. *Per Curiam: Honeste vivere* is a part of the law of principal and agent. *Conrey* v. *Brandegee*, 132.

6. A factor cannot be deprived of his commissions by the wilful act of his principal. The execution of a contract of agency, the obligations of which are mutual, cannot be placed entirely at the option of the principal. *Thompson* v. *Packwood*, 624.

7. An agent who advances money for the business of his principal is entitled, without any express agreement, to legal interest

from the day on which the advance was made. C. C. 2994. *Toledano* v. *Gardiner*, 779.

See PRESCRIPTION, 7, 8, 17, 18.

III. *Obligations of Agent.*

8. The contract implied between principal and factor, in the ordinary transaction of business, partakes, in some respects, of the nature of the contracts both of loan and irregular deposit. Their accounts-current are necessarily provisional until settled, and, even after settlement, may be rectified by either party on account of errors or omissions, subject to which every settlement is held to be made. *Bloodworth* v. *Jacobs*, 25. *Dunbar* v. *Bullard*, 810.

9. Attorneys in fact are bound to pay interest on any sums belonging to their principals which they have applied to their own use, and on any sum which they are in default in paying over. C. C. 2984. *Gridley* v. *Conner*, 87.

10. The action *mandati directa* embraces all claims of the principal against the agent, whether resulting from the execution of the obligation, or for damages for failing to execute it. *New Orleans Draining Company* v. *De Lizardi*, 281.

11. An agent is bound to pay legal interst on any sum belonging to his principal illegally converted to his own use, from the time of its conversion till paid. C. C. 2984. *Ib.*

12. Country merchants acting as mere forwarding agents for the neighboring planters, charging no commission for their services, but getting an indirect compensation in the patronage and good will of the planters in the business of their country store, by whom cotton has been shipped to a merchant for sale, are liable only for reasonable prudence in the selection of the merchant, and for the payment of the proceeds when received; they cannot be made responsible for any loss resulting from the dishonesty of the person to whom the cotton was shipped, if reputed at the time to be honest and solvent. *Davis* v. *Larguier*, 327.

13. Where the proceeds of crops received and sold by factors were more than sufficient to pay for any supplies or advances made by them for the use of a plantation, but, instead of being applied to the extinguishment of those debts, they were appropriated to the payment of private debts of an agent of the owner of the plantation, the owner cannot be made responsible by the factors for such supplies or advances. *Nugent* v. *Hickey*, 368.

14. Consignees, who accept a consignment, are bound to obey the directions of the consignor, made at a time when the property was under his control, as to the appropriation of the proceeds. *Cutter* v. *Baker*, 572.

15. An agent employed to demand from an executor an account, to receive any money coming to his principal, and to effect a partition, &c., takes from the executor, for a large portion of the share of his principal, notes and obligations of third persons, and the principal afterwards receives the notes and obligations from the agent, settles with him for his services, collects a part of the notes, and makes no complaint, nor gives any notice to the agent of an intention to hold him liable, during three years: *Held*, that these facts, coupled with that of her having instituted a suit against the executor and her co-heirs, charging them with having combined to defraud her by imposing upon her worthless claims as cash, will amount to a ratification of the acts of the agent, and exonerate him from responsibility. *Reed* v. *Ritchey*, 797.

16. Where an attorney at law consents to release a judicial mortgage in favor of his client in consideration of a payment of a part of the debt, and of having a certain note, made by a third person, placed in his hands, as collateral security, it being stated in the receipt given by him, "that the proceeds of the note are to be first applied to satisfy the remainder due on said judgment, and the balance to be paid over to the party depositing it," he will not be liable, in the absence of any proof of an undertaking on his part to put the note in suit in case of non-payment at maturity, for any injury which the owner of the note may sustain by the failure to sue on it in time. *Hughes* v. *Boyce*, 803.

17. A bank will not be responsible for any injury resulting from the omission to protest notes deposited with it for safe-keeping, and not for collection. *New Orleans Canal and Banking Co.* v. *Escoffie*, 830.

18. A charge made by a factor of two and a half per cent as commissions for advancing money, must be regarded as interest, and when, added to an amount charged specially as interest, the two sums exceed the rate which the law allows, a contract to pay it will be usurious. *Barrett* v. *Chaler*, 874.

19. A factor is entitled to legal interest on any advance made by him for his principal, from the date of the advance. C. C. 2994. *Ib.*

20. A charge of interest at a higher rate than the law allows, in a factor's account, is no bar to the recovery of legal interest. *Ib.*

See BANKRUPT, 5. COMPENSATION, 1.

IV. *Relation of Principal and Agent to Third Persons.*

21. Where the act of an agent, done without the authority of the principal, is ratified, the ratification cannot be divided, and applied to one part of the act and excluded from the other. It is entire or nothing. *Elam* v. *Carruth*, 275.

22. Knowledge by an agent of the fraudulent character of a transaction, acquired in the course of his employment, is binding upon his principal. *Kemp* v. *Rowley*, 316.

23. A principal who avails himself of a purchase made by an agent by selling the property, will be bound to comply with stipulations made by the agent with the owner at the time of the purchase. *Cook* v. *Bank of Louisiana*, 324.

24. Though an agent had no authority, under his mandate, to sign notes or draw bills, yet if he receive from a party the proceeds of notes and bills so signed by him, as loans for the use of the plantation with the management of which he was entrusted by his principal, the latter will be responsible for the amount. *Reynolds* v. *Rowley*, 891.

25. Defendant appointed an attorney by an instrument, under seal, in these words, which was delivered to the Bank of C.: "I hereby constitute M. my true and lawful attorney, for me and in my name to draw, endorse, or accept any bills of exchange, promissory notes, drafts, checks, for any sum or sums of money whatever; also to received from the Bank of C. all moneys that may from time to time be due me by said bank, whether for dividends or otherwise, and for the same to execute all requisite acquittances; also to receive all presentments, demands, protests, and notices, in relation to any notes, bills or negotiable instruments, which may at any time be in possession of said bank, whether discounted or lodged for collection, upon which I am or may be chargeable, in the same manner as I would do, if personally present; and I do agree that the powers above granted shall be exercised, and that this instrument shall continue in full force, until revoked by some other written instrument, and until notice of such revocation shall have been delivered in writing to the cashier of the said bank; and lastly, I do hereby, for my heirs, executors, and administrators, jointly and severally, covenant and agree with the said Bank of C. and their assigns, that notwithstanding the death of me, or of any of us, every act, matter and thing, which shall be done in virtue of any part of these premises before notice of such death shall have been received by said bank, shall be valid and binding, and shall charge my heirs, executors and administrators, jointly and severally, to the same extent as though such death had not occurred; and from all and every damage or loss to arise from any such act, matter, or thing, I do do hereby bind myself, my heirs, executors and administrators, jointly and severally, to indemnify and fully save harmless the said bank and their assigns." M. having made several notes in his own name, endorsed them as the attorney in fact of the defendant, and in his own name as last endorser. The notes were discounted by plaintiffs, and the proceeds received by M, who absconded, leaving them unpaid. In an action against defendant as endorser: *Held*, that this instrument is a contract between defendant and the Bank of C. and not a naked procuration to M; that the endorsement was binding on defendant; that if it had been intended to confine the power to defendant's own business, there would have been some words of limitation; and that there is nothing in the rule that an agent cannot act so as to bind his principal where there is an adverse interest in him, which could prevent M. from binding the defendant by the endorsement. *Bank of Charleston* v. *Hagan*, 999.

26. The claim of one who has furnished labor and materials for the construction of a steamer under a contract with an agent of the owners, asserted in an action against the latter for the price, cannot be defeated on the ground that the cost of the steamer exceeded the amount for which the agent was authorised to bind the owners, where there is no evidence that the limit had been exceeded at the time the plaintiff furnished his labor and materials, and it is proved that the owners accepted and used the boat without having demanded an accurate statement of the liabilities contracted for her construction. *McAlpin* v. *Lauve*, 1015.

See Corporation, 1. Evidence, XVII. Marriage, 53. Offences, &c. 13. Privilege, 6, 7. Quasi-Contract, 5. Sale, 3, 24.

V. *Revocation.*

27. Where a married woman retains the right to administer personally her paraphernal property without the assistance of her husband, her marriage will not revoke the powers of an agent who had been previously entrusted with its administration. *Reynolds* v. *Rowley*, 890.

MANSLAUGHTER.

See Criminal Law, 16.

MARRIAGE.

See Evidence, 38, 89, 90. Mandate, 27. Tutorship, 11, 24.

I. *By What Law rights of spouses governed.*

1. The matrimonial rights of a wife, who marries with the intention of removing into another State, must be governed by the laws of her intended domicil. *Fisher* v. *Fisher*, 774.

2. Where moveables forming part of a succession opened in this State are bequeathed to, or inherited by, a married woman, domiciled, with her husband, in a foreign country, and the wife subsequently dies, the law of the domicil of the spouses, in case of a contest between the survivor and the heirs of the deceased spouse, will govern in determining to whom the property belongs. *Marcenaro* v. *Bertoli*, 980.

II. *English Law.*

3. By the laws of England legacies to a wife, and residuary personal estate inherited by her, are included under the term *choses in action*; and it is only where they have been reduced into possession by the husband, that they become his property. To affect such a reduction the husband must exercise some act of dominion over the property; the mere intention to reduce them into possession is not enough. To effect a reduction the act must be such as to change the property; it must divest the wife's right, and make that of the husband absolute. *Ib.*

III. *Marriage Contract.*

4. Under the laws in force in 1805, the appraisement in the marriage contract of a slave brought into the marriage by the wife transferred the right of property in the slave to the husband; and the only claim of the wife was for the amount of the appraisement. *Neala* v. *Fontenot*, 782.

IV. *Community.*

5. A wife cannot be made responsible for wages due to a laborer for work done for the community, in the absence of proof of any fraud or misrepresentation on her part, calculated to mislead the plaintiff, by inducing him to believe that the property was paraphernal. *Hellwig* v. *West—Rehearing*, 3.

6. A promise by a wife to pay a laborer who had been employed to work on community property, is not obligatory. Whether separated in property or not, a wife cannot bind herself for her husband, nor conjointly with him, for debts contracted by him before or during the marriage. C. C. 2412. *Ib.*

7. Compensation is due to the community, for the value of useful improvements made during its existence, by the common labor or expense of the spouses, upon the separate property of either. But as such improvements benefit the community by increasing the value and income of the property, which it enjoyed to the day of its dissolution, and are of advantage to the heirs of the owner only from that period, the compensation to which the community is entitled is the value of the improvements at the time of the dissolution, and not at the time when they were made; but whatever may be their value at that time, the recompense due to the community can never exceed their cost. *Depas* v. *Riez*, 30.

8. Any legal evidence is admissible to rebut the presumption that, a balance due on the price of property purchased by the husband before marriage, but subsequently paid for by him, was paid out of the funds of the community. *Ib.*

9. The community is entitled to the enjoyment of all the property and effects belonging to the husband at the time of the marriage (C. C. 2371); and it owes no recompense to the succession of the latter for any diminution in their value resulting from such enjoyment. *Ib.*

10. Property brought by the husband into marriage will belong to his succession, in the condition in which it was at the dissolution of the marriage; but it cannot claim credit for the value of the property at the date of the marriage. *Ib.*

11. The debts of the community must be paid out of its assets, and the surviving wife is entitled only to one-half of what will remain after the payment. *Ib.*

12. Plaintiffs' ancestor having acquired, during marriage, a warrant authorizing the holder to enter a certain quantity of public lands previously offered for sale, located it, after the death of his wife, on a part of the public domain which he occupied with his family, and on other adjoining lands, which had not been offered for sale until after her death. Under a pre-emption right acquired by a settlement commenced during the community, and continued after its dissolution, he purchased another portion; and other land was purchased by him after the dissolution of the marriage, under a settlement right of a third person, also acquired by him during the marriage. In an action by the heirs of the wife, against the defendants claiming under a purchase made from plaintiffs' ancestor after the dissolution of the community, the purchase being considered to have been made without notice: *Held*, that the title to the lands never vested in the community, and that whatever equitable claim plaintiffs may have against their father, the title of

the defendants is unaffected by it. *Per Curiam:* Purchasers, without notice, cannot be disturbed by reason of frauds committed by their vendors, unless their participation in them be proved. *Sexton* v. *McGill*, 190.

13. The husband as head and master of the community may alienate *à titre onéreux* the immovables of which it is composed, without the consent of his wife. The laws of Louisiana, like those of Spain, recognise no title in the wife, during marriage, to any part of the acquêts; she becomes the owner of one-half, only after the dissolution of the marriage. C. C. 2373. *Guice* v. *Lawrence*, 226.

14. A voluntary surrender of property, made by the husband to his creditors, becomes, after acceptance, an alienation of the property, vesting the title thereto in his creditors; and, where the property surrendered was acquired during marriage, the proceeds must go to the payment of the debts proved in the *concurso*, giving the preference to those contracted during the community (stat. 29 March, 1826, § 2); and where the community is dissolved by the death of the husband after the surrender, the wife will preserve only her recourse against the syndic, for one-half of any balance remaining in his hands after payment of all the debts. *Ib.*

15. Where property belonging to the community of acquêts has been alienated by the husband in fraud of the rights of the wife, the only recourse given to her by art. 2373 of the Civil Code is against the heirs of the husband after the dissolution of the marriage. *Ib.*

16. The heirs of the wife are entitled to one-half of property purchased by the husband during the existence of the community, though not paid for till after the the death of the wife, subject to the payment of one-half of the community debts. *Morris* v. *Covington*, 259.

17. Where a lot of ground purchased during the existence of the community of acquêts is incorrectly described in the conveyance, but, after the dissolution of the community by the death of the wife, a new conveyance is executed to the husband for the property with a correct description, the title thus acquired will enure to the benefit of the community. *Ib.*

18. Where a surviving wife takes possession of property of the matrimonial community, after the death of her husband, uses it as her own, and attempts to conceal and withhold it from the succession of her husband, she will render herself liable thereby for one-half of the debts of the community. *Scott* v. *Rusk*, 266.

19. The separate property of a married woman is liable for debts contracted during marriage for her individual use, or for the improvement of her separate property, or for marriage charges which she is bound by law to bear, though the debt was created while her paraphernal property was under the administration of her husband, and during the existence of the community of acquêts and gains. Art. 2372 of the Civil Code, which declares that debts contracted during marriage must be acquitted out of the community property, applies to the parties alone, regulating their rights, as between themselves, on the settlement of the community. *Dickerman* v. *Reagan*, 440.

20. The acceptance and renunciation of the community by the heirs of the wife, are subject to the rules provided by law for the acceptance or renunciation of successions under the benefit of inventory; and the rights and powers of creditors are the same in both cases. C. C. 2383. They may, in either case, sue the legal representative of the succession, or make opposition to the accounts rendered by him. If they do so, on an exception by the executor or administrator, that the time allowed to the heir for deliberating whether he will accept the succession, or community, has not expired, the proceedings must be stayed until the expiration of the term, or until the heir has decided. C. C. 1046. Where no such exception is taken, either in writing or argument, the court will proceed to decide on the rights of the creditors. *Succession of Plauché*, 575.

21. The succession of a deceased wife can be made liable only for one-half of the community debts. *Ib.*

22. No collation is due to the succession of the wife for advances by the husband to one of his children, made in his own name and right, while the Code of 1808 was in force, where the father has died, and the widow has not accepted the community. Code of 1808, b. 3, tit. 5, art. 21. Nor will the circumstance that she did not renounce the community in strictly legal form be viewed as an acceptance, though the law in force at the time required the same formalities in renouncing, as in accepting, a succession. *Succession of Montegut*, 630.

23. A sale of community property surrendered by a surviving husband to his creditors, made by order of court without the advice of a family meeting, is irregular, so far as the minor heirs of the wife are concerned; but as this irregularity may be cured, and the sale be ratified under art. 1788 of the Civil Code, by afterwards obtaining the ratification of the sale by a family-meeting, the court may make a ratification of the sale by the heirs the condition of allowing them relief on other points. *Dunbar* v. *Creditors*, 727.

24. In an action by a wife against the

purchaser of slaves claimed as paraphernal property, bought by the defendant at a sale under execution, in which the husband is cited in warranty, judgment may be rendered against the defendant for the whole of the slaves and their hire, though the community had been dissolved by the death of the wife *pendente lite*; nor will the death of one or more of the slaves defeat the right to recover their hire while alive, on the ground that eviction was a prerequisite to its recovery. *McIntosh* v. *Smith*, 756.

25. The profits of all the effects of which the husband has the administration, and all the estates which either spouse may purchase during the marriage, though the purchase be only in the name of one of them, are considered by law to belong to the community, and are liable for the debts of the husband whether contracted before or during the marriage. C. C. 493, 2371. To establish a title in the wife, in her separate right, to property purchased under such circumstances, she must show that the price was paid with paraphernal funds of which she had the administration. *Fisher* v. *Gordy*, 762.

26. Where parties contracted a marriage in another State with the *bonâ fide* intention of establishing their matrimonial residence in this, and, within a reasonable time thereafter, become domiciled here, any property belonging to the wife before the marriage, received by the husband afterwards or at the time, will remain her separate estate, according to the laws of this State; and the mortgage of the wife for the security of her paraphernal rights will attach from the dates at which any sum of money may have been received by the husband, though received before the removal of the spouses to this State; and this without registry. C. C. 2367, 3297, 3298. *Fisher* v. *Fisher*, 774.

27. A married woman will not be bound personally by a note executed *in solido* with her husband, when at the time a community of acquêts existed between her and her husband, and the latter had the exclusive administration of her paraphernal property. *Wiley* v. *Hunter*, 806.

28. Where there is a community of acquêts, and the husband has the exclusive administration of the paraphernal property of the wife, purchases made during marriage fall into the community. *Ib.*

29. Where a slave purchased and paid for by the wife before marriage, is sold during its continuance, and it is not shown that the wife had the separate administration of her property, no proof will be necessary to charge the husband with the amount. *Vitrac* v. *Rey*, 824.

30. Plaintiff, a married woman, purchased certain property in her own name, at a probate sale of the succession of her father, made for the payment of debts and to effect a partition, the price of which was less than her share in the succession. The sale of the property of the succession was directed to be made for one-tenth cash, and the balance on credit. The act of sale declared that the price had been "in hand paid." The succession was solvent. In a partition subsequently made between the heirs, a note given by plaintiff for the credit portion of the price was given up to her, as a payment *pro tanto* on her share in the succession. *Held*, that the interest of plaintiff in the succession of her father being paraphernal, the property so purchased by her must also be considered paraphernal, being an exception to the general rule that property purchased during marriage, whether in the name of the husband or wife, belongs to the community; and that the law, in this respect, was the same before the promulgation of the Civil Code of 1825 that it is at present. *Stroud* v. *Humble*, 930.

V. *Dower.*

31. *Quoad* creditors, the wife or her heirs must show, otherwise than by the confession or acknowledgment of the husband in the marriage contract, the origin and payment of the dowry. By the french law, the receipt of the husband to a person by whom the dowry was due, although by private act, provided its date be certain and anterior to suit by the creditors, is sufficient evidence of payment, subject to the right of the latter to controvert the receipt and prove its simulation; but the acknowledgment is not received as proof when the dowry purports to have been constituted by the wife herself, the legal presumption being that "*c'est donner à sa femme que de reconnaître en avoir reçu quoique ce soit*;" in such a case the acknowledgment of the husband is not even binding on him or his heirs—the wife must prove the origin of the money, and the truth of the receipt. *Aliter*, as to the acknowledgment by the husband in the marriage contract of the estimated value of clothing, linen, and jewelry brought by the wife into the marriage, to an amount suitable to her condition; the presumption is that she had such things. *Succession of Guillemin*, 634.

32. After a separation of property, the dotal effects of the wife cease to be inalienable. *Bienvenu* v. *Derbes*, 771.

33. Dotal property is inalienable during marriage. *Brown* v. *Brown*, 834.

VI. *Privilege and Mortgage of Wife.*

34. A wife has no privilege on the immovables of her husband, for dotal or para-

phernal funds received by him. The only privilege given to a wife on the property of the husband is for her dotal rights, and is restricted to moveables. C. C. 2355, 2356, 3219. *Friend* v. *Fenner*, 789.

35. For the protection of her paraphernal funds, the wife has a mortgage only. C. C. 2367. *Ib.*

36. The immovable property of the husband is tacitly mortgaged for the re-payment of paraphernal funds of the wife received by him during marriage; and this mortgage takes effect as to third persons, without registry, from the time when the funds were received. *Cane* v. *Alley*, 918.

See 26 *Suprá.*

VII. *Contracts of Married Women.*

37. The incapacity of married women to contract is not universal and absolute. The limitations imposed on their capacity to contract, for the maintenance of the marital power or for their protection against its abuse, must be construed strictly. In all cases to which they do not extend, the capacity of women is not affected by marriage. *Hellwig* v. *West*, 1.

38. The plea of want of authorisation will not avail a married woman, where its effect would be to enable her to commit a fraud. For the same reason, in all obligations arising from quasi-contracts, offences, and quasi-offences, the wife is bound without authorisation. *Ib.*

39. Laws intended for the protection of married women will not be extended to their assignees, who have no claim on the equity of the court by reason of their personal incapacities. *Rowley* v. *Rowley*, 208.

40. A husband is not responsible for debts contracted by his wife before marriage. *Bank of Louisiana* v. *Wilcox*, 344.

41. Decision in *Bank of Louisiana* v. *Farrar*, 1 An. R. 49, affirmed. *Mechanics and Traders Bank* v. *Rowley*, 372.

42. Where a wife, separated in property, by whom a note had been executed jointly with another person, after the maturity of the note executes a second note, payable at a future period, for the amount of the original note with interest, and delivers it to the payee to be signed by her co-obligor, taking an obligation from the payee to deliver the first note on the execution of the second by her co-obligor, and her husband, acting as her agent, afterwards gives a receipt to the payee for the first note, reciting therein that the second note had been made in renewal thereof, it is sufficient evidence of his authorising the wife to bind herself by the note. *Brander* v. *Cobb*, 396.

43. The authorisation of the husband is not required to acts of the wife, necessary in the administration of her paraphernal property. *Dickerman* v. *Reagan*, 440.

44. A married woman, who has obtained a judgment against her husband, is competent to receive payment, and give a discharge. Her receipt is evidence of payment, as between the parties. *Farrar* v. *Rowley*, 475.

45. In principle, no distinction can be made between a conventional transfer of property by a husband to his wife for payment of her dotal or paraphernal rights, and one made under the form of judicial proceedings. *Dennistoun* v. *Nutt*, 483.

46. The general rule is that, husband and wife are incapable of contracting with each other. The only exceptions to this rule are those enumerated in art. 2421 of the Civil Code. *Ib.*

47. A note executed by a married woman, secured by mortgage on her property, for the repayment of money lent to her husband, cannot be enforced against her. To recover against the wife on such a contract, it must be shown that the loan enured to her benefit. C. C. 2412. *Taylor* v. *Carlile*, 579.

48. It is no objection to the validity of a mortgage executed by a married woman, under the 25th sec. of the stat. of 2d April, 1832, incorporating the Union Bank, to secure a loan made to her husband, that her rights were not explained to her, out of the presence of her husband, by the notary before whom the mortgage was executed. *Per Curiam:* The law requires that married women should be made acquainted with their rights, when about to renounce them; but the bank does not claim under a renunciation by the wife, but under a direct obligation, which she had capacity to contract. *Webb* v. *Union Bank*, 585.

49. Though a wife suffer her property to be sold to pay her husband's debts, without opposition, she will not be thereby precluded from reclaiming it. The law presumes that she was prevented by her husband from asserting her rights. *McIntosh* v. *Smith*, 766.

50. Acts or omissions which would constitute fraud in other persons, will not necessarily be construed to be fraudulent against married women. *Ib.*

51. A donation made by a wife to her husband during marriage, in case of her death without descendants or ascendants, can comprehend only the property, moveable and immovable, existing at its date. C. C. 1514. *Soileau* v. *Rougeau*, 766.

52. Sec. 29 of the stat. of 1 April, 1835, incorporating the New Orleans Gas Light and Banking Company, authorised any married woman of age to bind herself and her property, in any hypothecary contract lawfully entered into by the husband with the bank, as a surety for the debt due by

the husband to the bank. *Farrar* v. *New Orleans Gas Bank*, 873.

53. A married woman having, under art. 2361 of the Civil Code, the right to administer personally her paraphernal property, may appoint an agent to act for her in its administration, and she will be responsible for his acts. *Reynolds* v. *Rowley*, 891.

54. A married woman may bind herself as surety for any other person than her husband, when authorised by the latter, or by the proper judge. *Farrell* v. *Yoe*, 903.

See 5, 6, *Suprá*.

VIII. *Actions by or against Married Women.*

55. Where there is no evidence that the husband has authorised his wife to sue, and there is no appearance on his part, personally or by attorney, the suit must be dismissed. Her own statement that she was authorised, made in her petition, is insufficient. *Lacour* v. *Delamarre*, 140.

56. A judgment rendered by default against a wife, in an action on a note by which she bound herself jointly and severally with her husband, will be binding on her, though the note was given for a debt of the husband, where no fraud or duress is alleged to have been exercised to prevent her appearance and defence of the action. *Aubie* v. *Gil*, 342.

57. An appeal from a judgment rendered against a married woman, taken by her without the authorisation of her husband or of the court, must be dismissed. C. P. 106, 107, 118. And where it does not appear that she was authorised by either to defend the suit in the court below, and judgment was rendered against her by default, an averment in the petition for an appeal that the petitioner is acting with the assistance of her husband, is not sufficient; nor will an affidavit by her attorney at law that the husband had authorised the appeal, be enough. *Bray* v. *Bynum*, 879.

58. The appearance of a husband as a co-defendant with his wife in a suit, is tantamount to an express authority on his part for her appearance; but where an appeal is allowed to a husband and wife on motion in open court, and the husband afterwards abandons the appeal, giving no bond and making no appearance in the Supreme Court, the prosecution of the appeal will be considered, as to the wife, as unauthorised. Affidavits of the husband, or of his attorney, exhibited on the motion to dismiss, to prove the authorisation of the wife, will not be noticed; the case must be determined as it stood at the time of the motion to dismiss. *Elam* v. *Bynum*, 881.

59. Where a married woman joins her husband in an action, in which they assert title in the latter to property, conveyed to her by her tutrix, in settlement for her share in the succession of her father, by an act *sous seing privé*, duly registered, but signed by the husband alone, under which the latter was in actual possession, the possession and registry will amount to notice to third persons; and the joining in the action is an approval of the acts of the husband. *Lindeman* v. *Theobalds*, 912.

See Prescription, 23, 24.

MINOR.

See Obligations, IX. Sale, 67. Tutorship.

MORTGAGE.

See Executory Process, III. Hypothecary Action. Sale, 55, 65, 66, 70, 71. Succession, 27. Tutorship, 19, 20.

I. *Legal.*

See Marriage, 35, 36.

II. *Conventional.*

1. A conventional mortgage may be executed by an act under private signature. C. C. 3257, 3331. *Ells* v. *Sims*, 251.

2. Where a promissory note recites that it was executed for a sum due for work done by the payee on lands therein described belonging to the maker, and that the latter consents that the former shall have "a privilege and mortgage for securing the payment of said sum", the written acceptance of the mortgagee, subscribed to the instrument, is unnecessary. *Per Curiam:* The acceptance of the note by the payee was an acceptance of the mortgage which it stipulated, and, by the delivery of the note, the entire contract became complete between the debtor and creditor. *Ib.*

3. Where lands subjected to mortgage are described as situated on a particular river, in a certain parish, mentioning the names of the propietors of the adjoining lands, it is a sufficient statement of the nature and situation of the property. The omission to state the township, range and section, and the quantity of acres in the tract, is not material. *Ib.*

4. Where a mortgage mentions the parish in which the mortgaged property is situated, the bayou on which it lies, the number of acres it contains, the use made of the property as a plantation, and that it was purchased by the mortgagor at a probate sale of the succession of a person named, the conveyance being shown by

evidence to be of record in the same parish, the description of the property is sufficient. *Baker* v. *Bank of Louisiana*, 371.

5. A provision in a statute incorporating a bank, enacted under the constitution of 1812, "that it shall have the like privileges granted to it in making loans on mortgage, in taking security, and in enforcing payment, as are now accorded by law to the Bank of L——", will confer upon the former all the privileges granted to the latter, without any further specification. *Mechanics and Traders Bank* v. *Rowley*, 372.

6. The omission to state in a mortgage of slaves their "ages and nations", will not render the mortgage null. C. C. 3273, 3274. *Succession of Montgomery*, 469.

7. Slaves in possession of a mortgagor at the time of his death, of the same names with those enumerated in a mortgage executed by him, will be presumed to be the same. It is for the party who denies that they are the same, to establish that they are not. *Ib.*

8. Slaves belonging to the succession of a deceased mortgagor, corresponding in names, ages, and sex, with those described in the mortgage, in the absence of any evidence throwing doubt upon their identity, will be presumed to be the slaves included in the mortgage. *Gas Bank* v. *Wilcox*, 522.

9. A mortgage to secure a loan not made at the date of the mortgage, is an obligation subject to a potestative condition on the part of the debtor. Such a mortgage does not take effect from the date of the registry. It has effect only from the date, and for the amount, of the loan. *Meeker* v. *Clinton, and Port Hudson Railroad Co.* 971.

III. *Inscription.*

10. The omission to re-inscribe a mortgage on the books of the register of mortgages within ten years from the date of the first inscription, may be opposed by the parties themselves or by any third person having an adverse interest, although charged with notice. C. C. 3333. If the time be suffered to expire without a re-inscription the mortgage will lose its rank, and a subsequent re-inscription will give it effect only from the time of such re-inscription. Even the sale of the property mortgaged will not, where the purchaser fails to pay the price, dispense with the necessity of a re-inscription, which must be continued until the proceeds of the property are reduced to possession. By the omission to re-inscribe the effect of the first inscription ceases, not the effect of the mortgage itself. *Shepherd* v. *Orleans Cotton Press Co.* 100. *Hyde* v. *Bennett*, 799.

11. A description of the property mortgaged is essental in a re-inscription. A reference to previous mortgages will not cure the defect of a want of such a description. *Per Curiam:* The object of the re-inscription is to dispense with the necessity of searching for the evidences of mortgages more than ten years back. *Ib.* 100, 799.

12. A mortgagee not made a party to proceedings by which a judgment was obtained ordering the recorder of mortgages to erase the mortgage held by him, will not be bound by them. *City Bank* v. *Houston*, 114.

13. It is not necessary, under art. 3331 of the Civil Code, that it should appear affirmatively upon the registry of mortgages, or be proved *aliunde*, that a private writing, presented to the register of mortgages for record, was presented by the creditor himself. *Ells* v. *Sims*, 251.

14. The object of the registry of mortgages is to give public notice, with reasonable certainty; and a distinction may fairly be made, in the description of the thing mortgaged, between urban and rural estates, and greater minuteness and accuracy of detail be properly required in the former than in the latter case. *Ib.*

15. It is not necessary that the register of mortgages, in registering an original act, not authentic, upon his own knowledge of the signatures of the parties, should certify upon his records that he knew their signatures. *Succession of Montgomery*, 469.

16. The registry of a judgement, confessed by a third possessor of mortgaged property in favor of the holder of a note secured by mortgage, where neither the confession, nor the judgment rendered thereupon, recite, or refer to, the mortgage, will not amount to a re-inscription of the mortgage in the meaning of art. 3333 of the Civil Code. *McElrath* v. *Dupuy*, 520.

17. An intervention by a third person in an action to enforce a mortgage, will not do away with the necessity of re-inscribing the mortgage on the books of the register of mortgages within ten years from the date of the first inscription. *Per Curiam:* If ten years be permitted to expire without a re-inscription, the mortgage will loose its rank. A litigation between the mortgage creditors does not dispense with this re-inscription. *Ib.*

18. The registry of a judgment which decrees "that defendants do return the notes and money already paid by the plaintiff, and that they pay the costs," will not entitle the plaintiff to a mortgage as against third persons, so far as relates to the notes and money. The inscription can produce no effect, the judgment containing no statement of the amount in money for which it was rendered, nor any description of the notes. But it will have effect as a mortgage,

for the costs. *Jartroux* v. *Dupeire*, 608.

19. By the omission to re-inscribe a mortgage within ten years from the date of the first inscription, the effect of the inscription, not of the mortgage itself, ceases. The doubt which has existed as to the proper interpretation, on this point, of art. 3333 of the Civil Code, has arisen from the inaccurate translation from the french text. The mortgage is unimpaired thereby, as between the mortgagor and those claiming under him, and the mortgagee. C. C. 3314, 3315, 3316. *Bonin* v. *Durand*, 776.

20. Where a mortgage recites that it was executed to secure the payment of a note, describing the name of the maker, the date of the note, and the rate of interest, but is silent as to its amount, and the mortgage is recorded, but the note is not, the neglect to insert the amount will be fatal as to third persons, and the mortgagee will have no preferance upon the property mortgaged. C. C. 3277. *Lacour* v. *Carrie*, 790.

21. Judgments or mortgages registered in the parish of the supposed domicil of a party, will not be affected by a subsequent discovery, made in running the boundary line, that the residence of the debtor was beyond the line, and within the adjoining parish. *Per Curiam: L'erreur commune fait le droit. Cumming* v. *Biossatt*, 794.

22. Where a mortgage on slaves has been recorded in the mortgage office of the place where the debtor had his domicil at the time of the inscription, his subsequent removal to another parish and acquisition of a domicil there, will not make it necessary to register the mortgage in the parish to which he removes, in order to preserve its effect. *Ib.*

23. Where an owner of property subject to mortgage is divested of his ownership by a sale of the property under execution at the suit of a third person, the subsequent bankruptcy, and discharge of the debtor, under the act of Congress of 1841, cannot effect the property, so far as the necessity of re-inscribing the mortgage within ten years from the date of the first inscription is concerned. C. C. 3333. *Hyde* v. *Bennett*, 799.

24. The institution of suit by a mortgagor will not do away with the necessity of re-inscribing a mortgage on the books of the register of mortgages, within ten years from the date of the first inscription, in order to preserve its rank. *Ib.*

25. The inscription in the office of the register of mortgages of a copy of a judgment obtained by the mortgagee, which, after decreeing that the plaintiff recover of the debtor a certain sum, orders that his "mortgage be recognized and affirmed on the property described in the petition," &c. containing no description of the mortgaged property, but merely referring to the petition in the cause, will be insufficient as a re-inscription of the original mortgage. *Per Curiam:* Inscriptions must be renewed in the manner in which they were first made. C. C. 3333. An inscription of a conventional mortgage must describe substantially the mortgaged property. It must be reasonably accurate and full in itself, so as to inform the public what property is covered, and they must not be referred elsewhere for information which should be patent on the record. *Ib.*

26. Actual knowledge, by a purchaser, of an existing mortgage or title, is equivalent to a notice resulting from a registry of the mortgage or title. *Per Curiam:* If a party have knowledge of that of which it is the purpose of the law to notify him by causing an act to be recorded, he will be as much bound by his personal knowledge as if his information were derived from an inspection of the record. *Robinett* v. *Compton*, 846.

27. A judgment rendered against defendants jointly, and registered in that form, cannot be enforced against property, in the hands of a third possessor, as a judgment *in solido*. *Per Curiam:* Mortgages only have effect against third persons as they are registered. Third persons are not required to look beyond the register, to ascertain whether the character of the mortgage differ from that exhibited on the books of the mortgage office. *Taylor* v. *Hotchkiss*, 917.

See Offences. &c. 14.

IV. *Effect and Rank.*

28. A mortgage is a species of alienation, but not a sale. It is an alienation of a right on the property—not of the property itself, the title to which, as well as the possession, remains in the owner. *Duclaud* v. *Rousseau*, 168.

29. The execution of a mortgage does not imply the debtor's assent to to any judicial sale subsequently made to satisfy the debt. *Ib.*

30. One holding a prior mortgage cannot prevent the sale of the mortgaged property at the suit of a subsequent mortgagee. He must exercise his rights on the proceeds. *Rowley* v. *Kemp*, 360.

31. A purchaser in possession of real estate, sold by order of the Probate Court free of encumbrance, by whom the price has not been paid, may be condemned, in an hypothecary action by a mortgagee entitled to be paid out of the proceeds of the sale, to pay to the latter so much of the price as may necessary to discharge his claim, where the representative of the deceased mortgagor,

though notified of the proceeding, makes no opposition to it, and no creditor claims any superior privilege on the price. The purchaser is but a stakeholder, bound to account either to the plaintiff, or to the succesion of the mortgagor. *King* v. *Hicky*, 367.

32. A purchaser of property, subject to a mortgage duly recorded and containing the pact *de non alienando*, stands, with regard to the mortgagee, in the position of the mortgagor, and can make no objection to a seizure and sale by the mortgagee which the mortgagor could not make. *Barrow* v. *Bank of Louisiana*, 453.

33. The question whether the directors of a bank, which was authorised by its charter to lend money upon mortgage on lands only where they are in a state of cultivation, have exceeded their authority by making a loan upon unimproved property, is one which concerns the State and the stockholders only. Third persons connot set up the objection, that the loan for which the mortgage was given, being on unimproved property, was illegal. *Ib.*

34. Where a mortgage creditor by whom an order of seizure and sale had been taken out against the mortgaged property, enters into an agreement with the debtor, by which it is stipulated that the latter shall convey to him certain property free of encumbrance, and that, in consideration thereof, the creditor shall assign to the debtor "all his right to the judgment, or acknowledge satisfaction thereof, with subrogation, as may be required by the debtor," the creditor may, on the seizure by another mortgage creditor of the property which was to have been conveyed to him free of encumbrance, proceed by an hypothecary action againt the property originally seized, though in the possession of a third person, and cause it to be sold to satisfy his claim, without having taken any steps to rescind the contract. *Farrar* v. *Rowley*, 475.

35. Where a bank authorised by its charter to seize property mortgaged to it, in whosesoever hands it may be, and notwithstanding any sale or change of possession, as if still in the hands of the mortgagor, claims to be paid out of the proceeds of the sale of property so mortgaged to it, which had been sold by order of the Probate Court, it will be an affirmance of the sale, and the bank can no longer proceed against the property; but it does not thereby forfeit any of the rights it would have had to be paid out of the proceeds of the sale, as if made at its instance. *Gas Bank* v. *Webb*, 526.

36. By a special provision in the stat. of 7 April, 1824, sec. 31, incorporating the Bank of Louisiana, the right of the bank as a mortgagee to seize and sell the mortgaged property, is, in cases of mortgages executed under that act, unaffected by the death of the mortgagor. *Chigé* v. *Landreaux*, 606.

37. The consent of a mortgagee to give a preference over his mortgage to one executed in favor of a third person, does not amount to a cancelling of the mortgage of the former. It is a mere agreement that such third person, for the amount of his mortgage, shall take the place of the mortgagee who consents to the postponement. *Loucks* v. *Union Bank*, 617.

38. A husband, on whose property a legal mortgage existed in favor of his wife, having borrowed money from a third person to purchase lands from the government, after making the entry, and on the same day, executed a mortgage on the land in favor of the lender to secure the amount loaned, and a few days after, registered the mortgage: *Held*, that the mortgage in favor of the lender was inferior to the wife's, which existed before it, and took effect on the land the instant it was purchased by the husband. *Fontenot* v. *Soileau*, 774.

See BANKRUPT, 1, 2.

V. *Extinction.*

39. The maker of a note executed a mortgage, to secure an accommodation endorser against loss in consequence of his endorsement of the note. At maturity, part of the note was paid, and another note, endorsed by the same person was given for the balance, the first note being returned to the maker. The second note was paid, after protest, by the endorser. In an action by the latter, claiming to be paid the amount by preference out of the mortgaged property: *Held*, that the mortgage was given to secure a specific debt, which was extinguished by novation, and that the mortgage was extinguished with it. *Bell* v. *Murphy*, 765.

40. Where one or more of several notes secured by mortgage have been extinguished by prescription, the mortgage itself will be extinguished *pro tanto*; and the maker of the notes cannot, by subsequent acknowledgements of the debt, made after the sale of the mortgaged property to a third person, revive the mortgage so as to affect the property in the hands of the latter, without his express assent. *Gruyson* v. *Mayo*, 927.

See SUMMARY PROCEEDINGS.

MURDER.

See CRIMINAL LAW, 16.

NEW ORLEANS.

1. The ordinance of the council of the Second Municipality of New Orleans of 29th August, 1846, imposing a special tax on all real estate within the limits of the municipality, for the purpose of paying its debts and providing for the support of the public schools, is legal and constitutional. *Second Municipality* v. *Duncan*, 182.

2. In the exercise of the power conferred on the council of the city of New Orleans by the 6th sec. of the stat. of 17 Feb. 1805, and subsequently transferred to the councils of the different municipalities by the stat. of 8 March, 1836, of taxing real and personal estate, the corporation is not bound to tax both species of property at the same time; a tax may be legally imposed on either alone. *Ib.*

3. The General Council of the city of New Orleans are authorised to establish by ordinance an uniform rate of wharfage, to be paid by ships, steamers, and other vessels, moored in front of any part of the city. The authority to impose a wharfage, or charge on vessels moored in the port of New Orleans, to defray the expenses of the erection and maintenance of wharves and other works necessary for the loading and unloading of vessels, and to secure a convenient access to them, is not inconsistent with any law of the State or of the United States, nor with the 8th or 10th sections of the first article of the constitution of the United States. *First Municipality* v. *Pease*, 538.

4. The statute of 12 March, 1838, s. 4, making it the duty of the mayor of the city of New Orleans, before authorising exhibitions in any theatre in that city, to require from the manager the production annually of a receipt from the treasurer of the Charity Hospital, showing the payment by the manager of the sum of five hundred dollars for the use of the hospital, is not unconstitutional. The exaction of a price for the license so granted, is not, in its proper legal sense, a tax. *Charity Hospital* v. *Stickney*, 550.

5. The 6th sec. of the stat. of 28 March, 1813, amending the act of 17 February, 1805, incorporating the city of New Orleans, by the words "incorporated suburbs" meant those suburbs which were urban at the time of the incorporation in 1805, and was intended to apply exclusively to such rural estates as had become urban since that time, or might thereafter become so. It refers exclusively to property laid out into streets, and is not repugnant to section 6 of the stat. of 1805. The 5th section of the stat. of 16 March, 1830, declaring what shall be considered as the "non-incorporated faubourgs" of the city, refers to the same suburbs as the stat. of 1813. *Third Municipality* v. *Ursuline Nuns*, 611.

6. The territory of the city of New Orleans was composed, at the time of its incorporation, of urban and rural property, the latter being by far the most extensive. *Ib.*

7. Property within the incorporated limits of the city of New-Orleans, not laid out into streets, is subject to taxation for all municipal purposes, except the maintenance of lights, of the city-watch, and for watering and cleaning the streets. Such property is not comprehended in the provision of sec. 1 of the stat. of 28 March, 1813. *Ib.*

8. The discretion vested in the Mayor and City Council of New Orleans by sec. 6 of the stat. of 17 February, 1805, does not authorise them to exempt any portion of the territory of the city from taxation. The ordinance of the Third Municipality, approved 2d April, 1845, exempting certain portions of the territory of that municipality from taxation, is consequently null. *Ib.*

9. The 1st sec. of the stat. of 17 February, 1805, restricting the right of the corporation of New Orleans to hold real estate, to such as is situated within the limits of the city, does not include slaves. *Girard* v. *New Orleans*, 897.

NEW TRIAL.

1. Where depositions were admitted without objection at the time, a new trial will not be granted on the ground, that the defendant, by whom they were introduced, retained them in his possession until plaintiff had nearly closed his evidence, in consequence of which he was taken by surprise. *Davis* v. *Dale*, 205.

2. Where the affidavit of a plaintiff sets forth that, since judgment was rendered, material evidence in support of her demand has been discovered, which could not have been obtained before, though due diligence was used, and states fully the facts expected to be proved, and the name of the witness to establish them, and the facts are such as, if satisfactorily established, would authorise a recovery, and no circumstances are disclosed which conflict with the affidavit or indicate a want of due diligence, a new trial should be granted. C. P. 560, 561. *Stone* v. *Rose*, 225.

3. Defendants sued as principal and surety on a bond, by which they bound themselves to keep a bridge in repair for a certain time, moved the court for a new trial, on the ground that they had discovered, since the trial, a written compromise, which had been signed by the plaintiffs, and the principal in the bond, settling the matters in

dispute between the parties: *Held*, that a new trial should not be allowed, as the instrument could not have existed without the defendants' knowledge, and should have been pleaded in their answer. *Police Jury* v. *Taylor*, 272.

4. Where a defendant, against whom judgment was obtained in his absence and in that of his attorney, makes oath that the evidence in support of his defence was in possession of his attorney, who was to have attended to the case, and that his absence was unexpected and unauthorised, and the truth of the affidavit is unimpeached, he will be entitled to a new trial. *Ivor* v. *Sullivan*, 292.

5. A new trial will not be granted on the affidavit of counsel of his ignorance of facts which were known to the party whom he represented before the commencement of the suit, but which were not communicated by him to his attorney, in consequence of the absence of the client from the State at the time of trial. *Per Curiam:* It was the business of the client to give proper information and instruction to his counsel. *Doat* v. *Maltby*, 583.

6. To entitle a party to a new trial, on the ground of the discovery of important evidence since the trial, it must be shown that it could not have been obtained by due diligence before. C. P. 560. *Ib.*

7. A new trial will not be granted on the affidavit of a party that, a person whose testimony was important in the cause, but who had not been summoned because he had declared that he was interested, had, since the trial, informed the applicant that he had become a competent witness. *Held*, that the interest of the witness was a question upon which the opinion of the court should have been had, and that a new trial should not be granted. *Hoffmeyer* v. *White*, 597.

8. The granting of new trials rests in the discretion of the courts of the first instance; and the Supreme Court will not attempt to control it but in very clear cases. *Pahnvitz* v. *Fassman*, 625.

9. Where an application for a new trial rests on the ground of newly discovered evidence, the party must make his vigilance apparent; if it be left in doubt, his application must fail. *Ib.*

10. An application for a new trial on the ground of newly discovered evidence, must be supported by the affidavit of the party making the application, and not by the oath of his counsel, unless some sufficient reason be shown why the party cannot take the required oath. The counsel may be ignorant of evidence material to the defence of the cause, and the client fully informed of its existence. *Chew* v. *Police Jury*, 796.

11. The fact that the counsel of a party was not aware that the case had been set for trial will not entitle the party to relief from the effect of a surprise and an *ex parte* trial, unless it be shown that the counsel could not, by the exercise of reasonable diligence, have ascertained the condition of the case, and been present at its trial. *Riley* v. *Louisville*, 965.

12. Where a party expressly waived his right to challenge a juror who declared that he had formed an opinion on the case, the fact of the juror's impartiality cannot be urged by him as a ground for a new trial. *Stachlin* v. *Destréhan*, 1019.

13. The fact of the existence of strong prejudice in the public mind against a party is a ground for an application for a change of venue (stat. 1 June, 1846, s. 3); but is no ground for a new trial, unless it be shown that the prejudice operated on the minds of the jurors or influenced their verdict. *Ib.*

14. Where a party resides in the parish in which a case is tried, and is not absent at time, an affidavit for a new trial on the ground that it had been discovered since the trial that some of the jurors had formed and expressed opinions before being sworn, must be made by the party and not by his attorney. Stat. 20 March, 1833, s. 16. *Ib.*

See Criminal Law, 19.

NOTARY.

It is no objection to the homologation of a partition made by a notary, who holds also the office of parish judge, that any objections to his decisions as a notary, on questions arising in the course of the partition, must be determined by him in his capacity of parish judge. *Per Curiam:* The inconvenience, if it be one, is the necessary result of the parish judge system. *Babin* v. *Nolan*, 346.

NOVATION.

1. Where a vendor takes the notes of the purchaser, payable at a future day, "in payment of the balance of the price," it is a novation of the debt; and the remedy of the vendor will be confined to a personal action against the parties to the notes. *Cammack* v. *Griffin*, 175.

2. Novation will not be presumed The intention to make a novation must be clearly shown. C. C. 2186. *Parker* v. *Alexander*, 188.

3. Where the payee of a note, secured by mortgage, executed for a community debt, receives from the maker crops made on the community property, more than sufficient to discharge the debt, but instead of

applying their proceeds to its payment, pays them over to the maker, and gives him personally credit for the amount of the note, it is a novation of the debt, and will discharge the community. *Morris* v. *Covington*, 259.

NULLITY.

1. Defects of form only will not render an act null in cases not expressly provided for by law, nor coming within the legal intendment of art. 12 of the Civil Code, as fixed by the jurisprudence of the country from which it was derived. *State* v. *Martin*, 667.

2. Incapacities and defects of form are *stricti juris*. They cannot be extended from one person to another, nor from one case to another. *Ib.*

OBLIGATIONS.

See Compensation. Novation. Payment. Prescription, 15.

I. *Conditional and Unconditional.*

1. Plaintiffs, owners of a steamer, received on their boat a quantity of cotton, to be delivered to the consignees for a certain freight. They were allowed, by the terms of the bills of lading, to reship the cotton on another boat. The cotton was reshipped on a steamer belonging to defendants, to be carried a part of the distance. The bills of lading were transferred to the latter, who, after deducting the amount agreed to be allowed to them for freight for the distance it was carried by them, paid plaintiffs an amount in cash, and gave them a note and a due bill, which together made up the full amount of the original freight contracted to be paid by the owners of the cotton for its transportation to the place of consignment. The cash was paid without any stipulation for its return in any future event, and the note and due bill were absolute on their face; nor was any condition stated in what passed orally between the parties. The cotton was lost by an unavoidable peril of the navigation shortly after it was reshipped, and the defendants were thus prevented from delivering the cotton and earning the freight, and never received any part thereof. In an action by the payees on the note and bill: *Held* that, by the absolute form in which defendants stipulated, they have subjected themselves to the burden of establishing their release by some implied condition resulting from the nature of the contract, if any such existed; that the peril to which the goods would be exposed, and with them the right to freight was one that might have been easily forseen; that the chance of earning freight and of re-imbursing themselves for any payments to the plaintiffs by collecting the entire freight of the consignees, was a benefit offerd to the defendants, which they thought ith eir interest to accept with the accompanyng burden; and that they took upon themselves the risk of the whole amount of freight money. *Moss* v. *Smoker*, 990.

II. *Capacity of Parties.*

2. An emancipated minor, sued on notes given by him for the price of a steamer, purchased after his emancipation for the purpose of being employed by him in transporting freight and passengers, and which was so employed, he commanding her as captain, cannot be relieved from his obligation on the ground of minority. C. C. 2222. *Booth* v. *McFarland*, 398.

3. The blind are not declared by law incapable of contracting; and, as a general rule, all persons have that capacity except those whose incapacity is expressly declared. *State* v. *Martin*, 667.

See Marriage, VII.

III. *Consent of Parties.*

4. The failure of any of the obligors named in an instrument to sign it, authorises the others to retract; but they must do so seasonably, before the contract takes effect. *McNamara* v. *Jarvis*, 591.

See Attachment, 5.

IV. *Object.*

5. Where the parties to an agreement entered into it for the purpose of defrauding their creditors, neither party can maintain any action on it. *Denton* v. *Wilcox*, 60.

6. A contract to pay compound interest is lawful, if made after the interest has accrued. C. C. 1934. *White* v. *Henderson*, 241.

7. In the absence of any proof of the residence of the parties to a note, and of any specification of the place of payment, the legality of the rate of interest stipulated in the note must be determined by the laws of the State in which it was dated. *Richards* v. *Presler*, 264.

8. Eight per cent a year is the highest rate of interest allowed by the laws of Mississippi, except in case of notes, or other written contracts, signed by the debtor, for the *bonâ fide* loan of money, when ten per cent may be stipulated: and in these cases, the note or writing must express that it is

for money loaned. Stat. of Miss. of 25 June, 1822. *Ib.*

9. By the laws of Mississippi, in case of an usurious contract, the principal only can be recovered. Stat. 25 June, 1822. *Ib.*

10. By the stat. of 19 February, 1844, no stipulation for conventional interest at a higher rate than eight per cent a year can be made, under the penalty of forfeiting the whole amount of interest. *Ib.*

11. By the laws of Mississippi, an agreement to postpone the payment of a balance due on a note for a certain period, on the payment of interest on such balance at the rate of ten per cent a year, is usurious, and subjects the party to a forfeiture of all the interest which may have accrued. *Erwin* v. *Lowry*, 314.

12. Decision in *Richardson* v. *Leavitt*, 1 An. Rep. 430, affirmed. *Merchants Bank* v. *Bank of United States*, 659.

13. A foreign creditor will not be aided by our courts in disturbing the possession of an assignee under a voluntary assignment of real property in this State, made in another State by whose laws it was valid. *Ib.*

See Attorney at Law, 2.

V. *Interpretation.*

14. A memorandum in writing, signed by a party, and left by him and the other party with a notary for the purpose of preparing an authentic instrument in conformity therewith, is as obligatory between the parties as the authentic act itself, and if any of its covenants are not embodied in the latter, they will not, for that reason, become inoperative. The two instruments are parts of the same contract, and must be construed together. *Akin* v. *Drummond*, 92.

15. In case of doubt as to the meaning of a contract, the mode in which the parties undertook to execute it themselves, is the best exposition of its intendment. *Farrar* v. *Rowley*, 475.

16. Where, after a judgment ordering one of the parties to convey to the other one-third of the land which may be found to be contained within the limits of a confirmed land claim, the parties sign an agreement stipulating "that a survey shall be made by B., so as to cut off from the upper portion of the land the one-third thereof which, on the survey, may be found to be contained within the limits of the confirmed claim, &c., which survey, without further formality, shall serve as the basis of the conveyance which the defendant has been adjudged to make to the plaintiff," the parties will not be considered as having bound themselves to abide by any survey which B. might make, though it should be erroneous. *Bach* v. *Slidell*, 626.

VI. *Damages for Non-Performance.*

17. Interest may be recovered from judicial demand, when the debt is due by contract. *Parker* v. *Alexander*, 188.

18. Defendant, having built a bridge by contract, on the refusal of plaintiffs to receive it on the ground of its not having been erected in conformity to the agreement, executed a bond by which he bound himself to keep it in a good condition for a certain time, before the expiration of which it was destroyed by a freshet. The witnesses examined on the trial, thought that the freshet was not an irresistible force: *Held*, that the bond was conclusive evidence that the bridge was defective, and that defendant had not complied with his contract, and that the loss ought to fall on the party in fault at the time the bridge was destroyed. C. C. 1927, § 4. *Police Jury* v. *Taylor*, 272.

19. Plaintiffs executed their notes for part of the price of land purchased from the defendant. The latter bound himself to refund the price, in case of his failure to make a deed for the land prior to a period subsequent to the maturity of the notes. Plaintiffs took possession of the land, and continued to hold undisturbed possession. Defendant was never put in default for failure to execute the deed within the time prescribed. Plaintiffs having enjoined an execution issued on a judgment obtained on the notes: *Held*, that the injunction should be dissolved with damages. *Atchison* v. *Parks*, 306.

20. To recover money, paid under a commutative contract to a party thereto, the latter must be put *in mora*. *Hall* v. *Brashear*, 392.

21. Where one of the parties to a contract is bound to protect the other from eviction from property delivered to him in pursuance of the contract, and which he was to receive free of encumbrance, the seizure of the property by a mortgage creditor will put the former in default from the time of the seizure. *Farrar* v. *Rowley*, 475.

22. Since the stat. of 20 March, 1839, § 15, repealing art. 554 of the Code of Practice, all sums due on contracts bear interest from judicial demand, though none has been stipulated, and the demand is unliquidated. *Sullivan* v. *Williams*, 877.

23. Where one of the parties to a contract which stipulated for the payment of a fixed penalty in case of the failure of either to comply with its terms, notifies the other that it is impossible for him to comply with the contract, and that he must consider it as null, to exonerate himself from liability for the penalty on the ground of a subsequent promise by him to perform, he must show that the new promise was accepted by the other party. *Per Curiam:* The gratuitous abandonment of an acquired right is not to be presumed. *Green* v. *Fonbene*, 907.

VII. *Exercise of Rights and Actions of Debtor.*

24. Where an endorser on notes given for the price of property purchased by the maker, is compelled to pay them, he will be subrogated to the right of the creditor to maintain an action against a subsequent purchaser of the property to rescind the sale as simulated and fraudulent, though it was made before the payment of the notes by him. *Per Curiam:* The first vendor could have attacked the sale, for it was made while he was a creditor; and as the conditional liability of the endorser existed at the date of the sale, it is just that, when subsequently compelled to pay, he should be considered as standing in the place of the vendor, and subrogated to his right to sue for a recision of the sale. C. C. 2157. *Groves* v. *Steel*, 480.

25. Creditors can exercise all the rights and actions of their debtors, except those reserved in articles 1986, 1987 of the Civil Code. The reservation does not embrace actions of warranty. *Lynch* v. *Kitchen*, 843.

26. A judgment creditor having a judicial mortgage upon all the immovables of an insolvent succession, may sue a third person alleged to have in his possession property belonging to the succession, to compel its delivery to the administrator. *Per Curiam:* An administrator is only bound to account for what he receives; and if he could not be compelled by the creditors to take possession of all of the assets of the succession, they would be left without a remedy. *Neda* v. *Fontenot*, 782.

See Bankrupt, 3.

VIII. *Revocatory Action.*

27. A creditor cannot sue to annul a contract, made by the debtor, before his debt accrued. C. C. 1988. *Duclaud* v. *Rousseau*, 168.

28. Where the creditors of a vendor wish to annul a sale on the ground of fraud, they must resort to a direct action. *Nimmo* v. *Allen*, 451.

29. Questions of fraud, or revocatory actions, cannot be tried summarily, without the intervention of a jury, where either party insists upon his right to a jury. Such issues must be tried in a direct action; but where a person considers himself entitled to funds in the hands of a sheriff, he may arrest them till a final decision in a direct action. *Bank of Louisiana* v. *Delery*, 648.

30. Where a judgment creditor alleges that property was paid for by his debtor, but purchased in the name of a minor child of the latter to screen it from the pursuit of his creditors, and prays that it may be adjudged to belong to the debtor, and to be liable to seizure for his debts, the vendor of the property should not be made a party to the action. The object of the action being to determine the ownership of the property, and not to annul the sale, the vendor has no interest in the question. *Bronsema* v. *Rind*, 959.

31. A father can make no purchase in the name of his minor child, to the detriment of his creditors, whose claims existed at the time of the purchase. *Ib.*

32. No final judgment on the merits can be rendered in an action by creditors, the object of which is to declare the property purchased by a debtor in the name of a minor child to belong to the debtor, where the under-tutor of the minor, though made a party to the action, never answered, and where no judgment by default was taken against him. *Ib.*

See Prescription, 5.

IX. *Confirmation.*

33. Contracts entered into during minority, may be rendered valid, by a ratification, either express or implied, made after the disability has ceased. C. C. 1778, 1785, 1869. *Taylor* v. *Rundell*, 367.

34. Where improvements made on public lands of the United States purchased by a minor, are held by him after arriving at the age of majority, and he continues to cultivate the land, it will amount to a ratification of the contract. *Ib.*

See Sale, 67.

OFFENCES AND QUASI-OFFENCES.

1. Defendant sold a tract of land on a credit, retaining a mortgage to secure the price. There was, at the time of the sale, a legal mortgage on the land, which was not mentioned in the act of sale. The land was subsequently sold under a *fi. fa.*, at the suit of a creditor of the first purchaser, and was re-sold by the purchaser at the sheriff's sale to the plaintiffs, who as part of the price, paid defendant the balance due on the original purchase. In an action by plaintiffs against defendant, for damages, alleging their liability to sell the land in consequence of the legal mortgage, and charging him with fraud in concealing its existence from the first vendee, on an exception that plaintiffs showed no cause of action: *Held*, that plaintiffs not being parties to the act of sale from defendant, the omission to mention the legal mortgage, caused them, of itself, no immediate damage, and that it is only those acts or omis-

sions which, immediately and of themselves, cause damage to another, for which a party is responsible under arts. 2294, 2295, of the Civil Code. *Hopkins* v. *Van Wickle*, 143.

2. Trespassers cannot call in warranty persons under whose authority they act, and relieve themselves from responsibility by substituting the latter in their place. *Hood* v. *Stewart*, 219.

3. In actions of trespass there can be no examination into title. Possession alone is sufficient to support the action. *LeBlanc* v. *Nolan*, 223.

4. One who has cut wood on the land of an adjoining proprietor, through ignorance of the line of separation of the two estates, a part of which was removed and used by him, and the remainder taken possession of by the owner, being presumed to have acted in good faith, will be responsibile only for the value of the wood used by him. *Shepherd* v. *Young*, 238.

5. Where the owner of an undivided half of a tract of land authorises a third person to make bricks on it, the latter will not be liable to the other joint owner in damages for a trespass. *Ib.*

6. Where the bailees of securities entrusted to them for sale, tortiously pledge them, it is an exercise of dominion which amounts to a conversion. *New Orleans Draining Company* v. *DeLizardi*, 281.

7. The measure of damages where a written security has been the subject of a tortious conversion, is, ordinarily, the sum recoverable on that security, though the defendant have sold it for less. In the common law courts the plaintiff is entitled to recover under this rule, the *par* value of the security, with interest only to the day of rendering the verdict, the jury alone being competent to assess the damages, and their verdict being final. In this State, where the damages may be assessed either by the Inferior or Supreme Court, interest due on the day of the final judgment is recoverable as part of the damages. *Ib.*

8. One who removes, and converts to his own use, the materials of a house built on land from which he has been evicted, and for the value of which he was liable, will not be released from that liability, by proof that the ground on which the house was built has since been destroyed by the encroachments of a river. *Beard* v. *Morancy*, 347.

9. A manager of slaves employed on a plantation may recover from the owner damages for a wound inflicted on him by one of the slaves under his charge, not caused by any fault of the manager. C. C. 180, 181, 2300. Articles 170, 2299 of the Civil Code relate not to slaves, but to free servants; and the proviso in art. 2299, that responsibility for damage occasioned by servants only attaches where the masters might have prevented the act which caused the damage and have not done it, is confined to the cases of free servants. *Collingsworth* v. *Covington*, 406.

10. The tortious conversion of the property of a succession by a commercial firm, will render the members liable *in solido*. *Birdsall* v. *Bemiss*, 449.

11. Where under color of a warrant to search for stolen goods in a certain house, the parties charged with its execution force their way into an adjoining dwelling, against the remonstrances of the occupant, and search it without finding the stolen property, they will be responsible jointly, in damages, for the injury done thereby to the property and feelings of the occupant, and for the disturbance of his family; and where, in such a case, the damages are assessed by a jury, the verdict will not be disturbed, unless they are palpably excessive. Such warrants must be construed strictly. *Larthet* v. *Forgay*, 524.

12. One concerned in capturing an American vessel under color of the insurgent military authority of a foreign province, in the absence of proof of the recognition by the government of the United States of a state of war as existing between the insurgent province and the power to which it belonged, will be responsible to the owner of the vessel for the damage sustained by the capture. *Dimond* v. *Petit*, 537.

13. Where a factor is notified that cotton, consigned to him by a third person, was made on plaintiffs' plantation and belongs to them, and is directed not to pay over the proceeds without their consent, the notice will render the factor liable for any subsequent payment made to the consignor, not depending on a superior right. Art. 2926 of the Civil Code is inapplicable to the liability of factors receiving goods for sale. Their liability is fixed by commercial usage. *Ledoux* v. *Anderson*, 558.—*Ledoux* v. *Cooper*, 586.

14. After an adjudication at a probate sale made to effect a partition among heirs, it was discovered that the property sold was encumbered by a special mortgage in favor of a bank; and a part of the price was deposited by the purchaser in the hands of a third person, to be paid to the heirs upon their exhibiting proof of the erasure of the mortgage. On the production of a declaration, made by the administrator of the succession before a notary in the form of an authentic act, that he released the mortgage in favor of the bank, the recorder of mortgages cancelled the mortgage, and the heirs were thereby enabled to withdraw the amount on deposit. The bank having enforced its mortgage, the purchaser sued the heirs for its amount; and having made,

on execution but a part, proceeded against the recorder. *Held*, that the latter was responsible to the purchaser for the balance not recovered from the heirs. *Chigé* v. *Landreaux*, 606.

15. One who succeeds in establishing her right to freedom against a person by whom she is held in slavery, will be entitled to recover wages from judicial demand. *Arsene* v. *Pigneguy*, 621.

16. Defendants will be liable for any injury sustained by third persons in consequence of negligence in drifting a raft, where it is shown that they had purchased and paid for the raft, and that it had been delivered to their agent. Nor will proof that their agent took upon himself the risk of its safe transportation, exonerate them, as owners, from liability to third persons. *Taylor* v. *Mexican Gulf Railway Company*, 654.

17. The right of a master, under art. 181 of the Civil Code, to exonerate himself from responsibility for the offences or quasi-offences of a slave, by abandoning the slave to the person injured, is not affected by the circumstance of the slave being at the time confined in prison at hard labor, under a judgment of a court condemning him to imprisonment for a term of years as a punishment for the offence committed by him; and a notarial act of abandonment transfers to the party in whose favor it is made, all the possession which the law will, in such a case, permit the master to give. C. C. 2455. *Hynson* v. *Meuillon*, 798.

18. One whose property has been seized under execution against another, may recover damages against the sheriff and plaintiff in execution, *in solido*. *Stroud* v. *Humble*, 930.

19. An inspector of elections is not answerable in damages for a mere error of judgment in rejecting a voter, when his motives are upright. To maintain an action against him for refusing to receive a vote, it must be alleged and proved that he acted fraudulently or maliciously. To constitute malice the act must be a wrongful one, done intentionally, without just cause or excuse. Personal ill will to the party aggrieved is not essential to its existence; and, in the absence of any declared intention to do wrong, the motive may be inferred from the circumstances attending the act. *Bridge* v. *Oakey*, 968.

20. An owner of property is justifiable in beating a trespasser, only where the battery is necessary to the defence of his property. *Stachlin* v. *Destréhan*, 1019.

See Attachment, 6. Prescription, 3, Sheriff, 2 to 11.

PARTITION.

See Successions, 27.

PARTNERSHIP.

I. *Validity of Contract.*

1. The contract by which a particular partnership is formed must be in writing, where any part of the partnership stock is to consist of real estate. C. C. 2807. *Dunbar* v. *Bullard*, 810.

II. *Obligations of Partners among Themselves.*

2. A partner has no remedy against his co-partner for money paid or advanced on account of the partnership, or for profits made during its continuance, until a final settlement of the partnership. *Camblat* v. *Tupery*, 10.

3. Partners are bound to pay interest on sums taken out of the partnership funds from the time they are so taken. C. C. 2829. *Gridley* v. *Conner*, 87.

4. A carpenter employed to do certain work on a house belonging to two partners, in which they kept a grocery and billiard table, when the work was nearly finished purchased the interest of one of the partners, and finished the work afterwards. *Held*, that he might sue the other partner for his proportion of the price of the work; and that it is not necessary that he should sue for a settlement of the partnership accounts, the work not being a partnership transaction. *Boyd* v. *Brown*, 218.

5. Where one of the slaves put into a particular partnership was afflicted, at the time, with a chronic disease, of which he afterwards died, the partnership will not be chargeable with the loss. A stipulation in the contract of partnership that, in any case any of the slaves should die, the owner should be paid therefor at the valuation fixed by the articles of partnership, does not apply where the slave perishes by the badness of his quality. *Richardson* v. *Pumphrey*, 448.

See Privilege, 15. Sequestration, 4,

III. *Obligations of Partners to Third Persons.*

6. Commercial partners being bound *in solido* the debts due by them are indivisible, and no settlement of the partnership can be effected without their payment. *Gridley* v. *Conner*, 87.

7. The creditors of a partnership have a privilege on the partnership property entitling them to be paid in preference to the creditors of the individual partners; and any partner ultimately bound for the partnership debts, may maintain an action against his co-partner, to effect a proper application

of the partnership property to the extinguishment of the partnership debts. C. C. 2794. *Ib.*

8. The debts of the partnership must be paid, before any partner can have a right to require a particular piece of partnership property to be divided in kind. *Mourain* v. *Delamarre*, 142.

9. A partnership to carry on the business of ship-carpenters, is an ordinary partnership; and the members are liable jointly only, and not *in solido*. *Brown* v. *Hughes*, 623.

10. Where the credit of a commercial firm is used by the authority of one of the partners, and is relied upon by the other party in a transaction in the ordinary course of trade, all the partners will be responsible, whatever may be their liability *inter se*. *White* v. *Kearney*, 639.

11. The power of a partner to bind his copartners, either by note or his acknowledgments, or to use the social name, ceases with the dissolution of the partnership. Any subsequent power is derived, not from previous relations of the parties as partners, but from a new contract, which is one of mandate; and this mandate must be express and special. C. C. 2966. *Johnson* v. *Marsh*, 772.

12. Partnership property must be applied to the payment of partnership debts, in preference to those of the individual partners. C. C. 2794. *Dunbar* v. *Bullard*, 610.

13. Defendants, acting as partners, purchased a number of slaves in another State and re-sold them in a third, in both of which States they were personal property. They subsequently employed plaintiff in this State, as an agent to purchase slaves for them in a State in which slaves were personal property, to be re-sold in this. Purchases were made accordingly in that State, and the slaves re-sold here. *Held*, that as joint purchasers of personal property for sale defendants were commercial partners, and liable as such, before the employment of plaintiff as their agent (C. C. 2796); that the subsequent purchases for re-sale here were continued acts of the same partnership; and that the fact of the slaves becoming immovables, by destination of law, upon their introduction into this State, cannot affect the responsibility of defendants. *Sullivan* v. *Williams*, 876.

14. Where the business of a steamer is to carry freight for hire, an agreement made by the captain, or clerk of the boat, in order to obtain the carriage of merchandize and to earn freight for the owners, is within the scope of the partnership business; and notes executed in pursuance of it by the clerk, on behalf of the owners, will be binding on the latter. *Moss* v. *Smoker*, 990.

See ATTACHMENT, 7. BILLS OF EXCHANGE, 13.

IV. *Dissolution and Settlement.*

15. In an action by a partner against another, for the settlement of the partnership, it is the duty of the plaintiff to furnish the evidence necessary to enable the court to settle the partnership and determine the rights of the partners. Where such evidence is not furnished, the action will be dismissed. *Camblat* v. *Tupery*, 10.

16. Where a partner, pending a suit for the settlement and liquidation of the partnership, collects money belonging to it, under an appointment from the court, he has no right to withhold from the court the money so collected, under any plea or pretence personal to himself. To retain funds so collected is a flagrant breach of trust, and the court may compel their immediate production. *Gridley* v. *Conner*, 87.

17. After the disolution of a partnership and pending its liquidation, a partner is not permitted to do any act, still less to make use of the partnership funds in a manner, inconsistent with the purpose of a just and proper settlement. *Ib.*

18. It is not necessary that the creditors of a partnership should be made parties to an action between the partners for a settlement of the partnership affairs. *Ib.*

19. Where a partnership has been dissolved and one of the partners has died, a surviving partner, engaged in liquidating its affairs, cannot release the right of recourse of the partnership, as accommodation acceptors, upon a third person, so as to render the latter competent as a witness. *Bookout* v. *Anderson*, 246.

20. The fact of the dissolution of a partnership does not render a partner incompetent to receive, on behalf of the firm, an offer of delivery of goods sold to the partnership, or a demand of payment of the price. It is not necessary to put each partner separately in default upon a contract made before the dissolution. *White* v. *Kearney*, 639.

21. Where on the dissolution of a partnership one of the partners purchases the "other's interest in the partnership books and accounts," making the books the basis of the settlement and purchase of that interest, and it appears from entries in the books made by the latter before their sale, that a third person, to pay a debt due by whom a note had been executed by the selling partner in the name of the partnership, had advanced to the partnership a

sum of money a little less than the amount of the note, and that the partnership had assumed to pay the debt, the facts will amount to a ratification of the act of the partner by whom the note was executed, and the purchaser of the partnership books and accounts will be bound for the note, though not originaly liable, as it was executed without his authority, and not in the business of the firm. *Hopkins* v. *Johnson*, 842.

See ATTACHMENT, 1. CITATION, 3. COURTS, 3. RECEIVER.

PAYMENT.

See EVIDENCE, 9. EXECUTION OF JUDGMENT, 16. SALE, 29.

I. *Nature and Requisites.*

1. By the term payment is meant not only the delivery of a sum of money, but the performance of an obligation. It is an act requiring the exercise of the will—of consent. *Bloodworth* v. *Jacobs*, 24.

II. *Object.*

2. A note made payable in "Mississippi currency," will be taken to mean the lawful currency of the State, that is, gold and silver, in the absence of other proof that it was intended to be payable in the notes of the banks of that State. *Bullard* v. *Wall*, 404.

III. *Imputation.*

3. The debtor has the right to make the imputation of any payment made by him. If he do not exercise this right, the creditor may do so. If neither make any imputation, the law makes it for them; and in all cases, the imputation takes place in one of these modes, at the time of the payment. Where the imputation is made by the creditor, the debtor is always protected against surprise as well as fraud. *Bloodworth* v. *Jacobs*, 24.

4. When a debtor has accepted a receipt in which a payment is imputed to a particular debt, it is irrevocable, unless in case of surprise or fraud on the part of the creditor. C. C. 2161. *Ib.*

5. Where a factor sends an account to his principal at the usual time, in which certain imputations are made by the former, and the principal approves the account, or receives and acquiesces in it, and there is no fraud or surprise complained of by him, the imputation of payment must be considered as having been made by the authority of the principal, the ratification of the acts of the factor being tantamount to an original imputation by the principal; and such imputations cannot be subsequently changed by the debtor, nor by third persons. *Ib.*

6. Every ratification by the principal of the act of an agent, relates back to the time of doing the act, or making the contract, which is ratified; and this principle applies as well to acts of imputation of payment, as to other acts. *Ib.*

7. A payment made after maturity on a note which bore usurious interest from that time, where no imputation is expressed in the receipt nor otherwise shown, will be imputed to the principal, that being the debt which the maker had the most interest in discharging, the stipulation for interest not being binding on him. C. C. 2160, 2162. *Hynes* v. *Cobb*, 363.

8. Where judgment has been obtained against a party condemning him to pay a certain sum with interest at a certain rate from a particular time, and another sum with interest at a lower rate and from a later period, a payment made after judgment must, in the absence of any imputation by the parties, be imputed to the interest and principal of that portion of the debt bearing the highest interest, it being the oldest and most onerous. *Louisiana State Bank* v. *Barrow*, 405.

9. Where a partial payment has been made on a note, extinguishing thereby the debt *pro tanto*, the parties thereto cannot, by subsequently imputing the payment to another debt, revive the first debt, to the prejudice of third persons. *McElrath* v. *Dupuy*, 520.

10. One who holds a second mortgage on property previously mortgaged to secure the payment of a note, has such an interest in the extinguishment of the note, that a payment made on it cannot be afterwards imputed to another debt, without his consent, *Ib.*

11. Payment made on a note not due, but bearing interest from date, must be imputed to the principal on which interest was accruing, as the portion of the debt which the debtor had the greatest interest in discharging. As neither principal nor interest was due at the time of the payment, the imputation is not affected by art. 2160 of the Civil Code. *Ib.*

12. Where a factor sends an account to his principal at the usual time, in which certain imputations are made by the former, and the latter approves it, or receives and acquiesces in it, and no fraud or surprise is complained of, the imputations of payment must be considered as having been made by the authority of the principal, the ratification of the acts of the factor being tantamount to original imputations by the principal, and relating back to the subject of the ratification. *Dunbar* v. *Bullard*, 810.

13. Where payments are imputed to certain items, in an account approved by the debtor, at a time not suspicious, and it is not pretended that the object was to secure any unjust preference to the creditor, the imputation cannot be afterwards disturbed. *Barrett* v. *Chaler*, 874.

IV. *Tender and Consignation.*

14. A deposit made with a merchant, of a sum of money tendered in payment to a creditor, will not discharge the debt, nor place the money at the risk of the creditor. C. P. 412 *et seq.* *Benton* v. *Roberts*, 243.

15. A creditor is not bound to accept a tender of a sum less than the whole amount due him. *Ib.*

16. The mere announcement by the maker of a note of his readiness to pay, made to the holder, and the refusal of the latter to receive the amount, on the ground that it had been attached at the suit of a third person, is not a legal tender, and cannot stop interest. C. P. 407, 415. *Bacon* v. *Smith*, 441.

17. Where pending an action against the maker of a note, the defendant deposits the amount, with the interest and costs which had accrued up to the time of the deposit, with the clerk of the court, to abide the result of a controversy between the plaintiff and certain intervenors who claimed to be entitled to the amount, the deposit not being a tender, and the plaintiff not being entitled by its terms to take the amount, the defendant will not thereby discharge himself from liability for further interest and costs. *De Goer* v. *Kellar*, 496.

PETITION.

See PLEADING, V.

PETITORY ACTION.

See PLEADING, III.

PLEADING.

I. *Form of Action.*

1. A creditor for work done in constructing a levée under an adjudication made in pursuance of the law on the subject of roads and levées, though entitled to proceed *in rem* against the land, may recover, in an ordinary action, a judgment for his claim, with a privilege on the land. C. C. 3216. *Curtis* v. *Woodman*, 309.

II. *Possessory Action.*

2. The mere civil or legal possession of lands, not preceded by a real, actual possession, is insufficient to support a possessory action. C. P. 49. *Davis* v. *Dale*, 205.

3. One with whom slaves seized under an attachment are left, in virtue of an agreement between the parties that he shall have control over them till the termination of the action, with authority to hire or otherwise employ them, has no such use of the slaves as is contemplated by art. 47 of the Code of Practice; and, being the mere depositary of the slaves pending the attachment, possessing in the name of another, he cannot maintain a possessory action for their recovery. C. P. 48. *Pierse* v. *Amonett*, 357.

III. *Petitory Action.*

4. The plaintiff in a petitory action must recover upon the strength of his own title. *Bookout* v. *Anderson*, 246.

5. The title of a person who claims to be the owner of property cannot be contested by one who has no title to it. *Nimmo* v. *Allen*, 451.

IV. *Parties.*

6. Trustees, appointed under a law of another State to take charge of the assets, collect the debts, &c. of a dissolved corporation, may sue a debtor of the corporation in this State. *Planters Bank* v. *Bass*, 430.

7. Where the laborers employed by a builder, and the furnishers of materials for its construction, deliver to the owner attested accounts of the amount due to them for the purpose of having the amount retained out of subsequent payments to the contractor, in pursuance of the stat. of 18 March, 1844, and the amounts so claimed exceed the balance due to the builder, the owner may institute an action against the claimants, for the purpose of having the amount due by him distributed by order of court among the parties entitled thereto, and himself relieved from liability on depositing the amount due by him in court. *Clarke* v. *Saloy*, 987.

See BILLS OF EXCHANGE AND NOTES, 4.

V. *Petition.*

8. Where a wife sues to establish her right to have the proceeds of property applied to the satisfaction of certain mortgages in her favor, in preference to a mortgage executed by her and her husband in favor of a third person to secure the payment of their joint and several notes, on the allegation "that her renunciation was not binding, because she was not instructed by the notary, before whom the act was passed, of the

nature of her rights and of the contract, and that the requisites of the law to render such renunciation valid were not complied with, and that she acted in ignorance of her rights," the plaintiff cannot recover on the ground that, the debt for which the mortgage was executed was one for which she was not bound. The ground of nullity should have been specially alleged. *Rowley* v. *Rowley*, 208.

9. A variance from the corporate name in a petition filed in an action instituted by a corporation, which cannot mislead the defendant as to his creditor, is immaterial; as where a railroad company, invested with banking privileges, and incorporated under the name of the "New Orleans and Carrollton Railroad Company," is termed in the petition the "New Orleans and Carrollton Railroad and Banking Company." *New Orleans and Carrollton Railroad Company* v. *McKelvey*, 359.

10. Where one sued on an account, the principal item in which is stated to be a "balance of former account, as rendered," excepts to the petition as not sufficiently informing him of the nature of the demand, plaintiffs should not be allowed to proceed without furnishing the items of debit and credit, of which the account producing the balance was composed. *Ledoux* v. *Goza*, 395.

11. Under art. 172 of the Code of Practice, which requires that a petition "shall contain a clear and concise statement of the object of the demand, as well as of the nature of the title, or of the cause of action, on which it is founded," a defendant will be protected from any surprise resulting from the obscurity or duplicity of the allegations of the petition. *Barrett* v. *Zacharie*, 655.

12. In an action to recover moveables in defendant's possession, it is sufficient to allege that defendant took illegal possession of the things claimed, and continues to withhold them wrongfully. It is not necessary that the time, place, and manner of the taking possession, should be averred. *Clay* v. *Fisher*, 997.

See INJUNCTION, 7, 9.

VI. *Exception and Answer.*

13. Compensation must be pleaded specially. C. P. 367. *Marshall* v. *McCrea*, 79.

14. When an exception to the sufficiency of the ground for an injunction is overruled, the court cannot proceed at once to pronounce a final judgment in favor of the plaintiff. The defendant is entitled to file an answer, and put at issue the allegations in the petition. *Wood* v. *Henderson*, 220.

15. One who has caused himself to be substituted in the place of the original defendant in a suit, who was his warrantor, debars himself of the right to obtain a judgment in warranty against the latter. *Jones* v. *Hunter*, 254.

16. In an action against the endorser of a note secured by mortgage, defendant may set up his discharge in consequence of plaintiff's having postponed the mortgage by which the note was secured to another in favor of a third person, without having pleaded it specially, where, from previous proceedings in the case, plaintiff was apprised of the defence that would be set up, and the evidence of the facts which discharged the defendant was introduced by the plaintiff himself. *Duplantier* v. *Newcomb*, 279.

17. The non-joinder of all the obligors in an action on an obligation alleged in the petition to be joint, can only be taken advantage of by exception *in limine litis*. The exception is waived by an answer to the merits. *Forgay* v. *Lambeth*, 589.

18. Where in an action by creditors against the sureties in an administrator's bond, defendants plead that they have been discharged by the gross negligence of plaintiffs, it is an admission of their liability unless negligence be shown, and a waiver of any defects of form in the execution of the bond. *McNamara* v. *Jarvis*, 591.

19. After pleading the general denial, a defendant may avail himself of an exception taken by a party cited by him in warranty, *Vascocu* v. *Smith*, 828.

20. To support a plea of *litispendance*, the parties, and the objects of the action, must be identical. *Ingram* v. *Richardson*, 839.

21. Proof of the pendency of proceedings against executors to enforce a sale of the assets of the succession to pay the claim of a plaintiff, will not support a plea of *litispendance*, in an action to establish the personal liability of the widow, and the liability of the beneficiary heirs, by reason of their acceptance of the succession and community, and of their having taken the property in their possession. C. P. 335. *Ib.*

22. A plea in compensation which states that defendant had paid as surety for plaintiff's wife an obligation, against which plaintiff had promised to hold him harmless, on which obligation judgment had been obtained against defendant, stating the amount thus paid, but not describing the obligation, its date, the creditor, the time of payment, nor the title of the suit in which the judgment was obtained, is too vague. No evidence will be admissible under it. *Beall* v. *Allen*, 932.

23. Where a plea in compensation does not specify either the amount or the nature of the offset, no evidence will be admissible under it. C. P. 367. *Kenner* v. *Peck*, 938.

24. Where a plaintiff sues in a representative capacity, such as that of a curator or executor, want of authority to maintain the action must be specially pleaded *in limine litis*, in order to put him on the proof of his capacity. A plea of prescription is an admission of plaintiff's capacity, which will preclude the defendant from afterwards contesting it. *Parker* v. *Moore*, 1017.

VII. *Amendments.*

25. An amended answer, offered to be filed by third persons, who had, pending the suit, purchased, at a judicial sale made by order of another court, the title of the defendant to the property in contest in a petitory action, and who had been substituted in place of the original defendant, in which they set up the title so acquired by them, cannot be excluded as changing the character of the suit, by setting up a title under judicial proceedings, the validity of which cannot be tested in the suit in which their answer is offered. *Jones* v. *Hunter*, 254.

26. One by whom an action had been commenced as tutrix of minor heirs, to recover the value of improvements made by their father on lands of the defendant, may, on subsequently qualifying as administratrix of the father's estate, amend her petition, and claim to recover in the capacity of administratrix. Such an amendment does not alter the nature of the demand. *Womack* v. *Womack*, 339.

27. Where in a petition for an injunction to stay an order of seizure and sale, plaintiff acknowledges the existence of the mortgage on the land in controversy, but pleads prescription, and prays, as a third possessor of the land, that the mortgagee may be condemned to discuss other mortgaged property, he will not be allowed to amend his petition by declaring that the land had never been mortgaged. Such an amendment would be inconsistent with the previous pleadings and the party's own allegations. *Barrow* v. *Bank of Louisiana*, 453.

28. Where an action, as shown by the original petition, is neither petitory nor possessory, the plaintiff may amend his petition so as to make it clearly petitory. *Haydel* v. *Bateman*, 755.

29. An application to file an amended answer containing a call in warranty, made a year after filing the original answer, where the facts alleged in the amended answer must have been within the knowledge of the defendant before the institution of the suit, is too late, and will not justify any further delay for the purpose of bringing in the warrantior. *Lynch* v. *Crain*, 905.

VIII. *Inconsistent Allegations.*

30. An allegation that a judicial sale is null, is inconsistent with a claim to be paid by preference out of the proceeds. If the sale be null the claimant must exercise his privilege upon the property itself. *Bank of Louisiana* v. *Delery*, 648.

31. A party will not be allowed to deny under one plea a fact alleged by him in another. *State* v. *Martin*, 667.

IX. *Intervention.*

32. An intervenor is not entitled to make his warrantor a party to the action. C. P. 389 *et seq.* *Devall* v. *Boatner*, 271.

33. One who alleges that he has a joint interest with the plaintiff in a contract between the latter and the defendants, and that he furnished money and labor for its execution and is entitled to one-half of the contract price, cannot intervene in an action on the contract, instituted by the plaintiff to recover the price of the work done in pursuance of it. The intervenor, not being a party to the contract, has no more claim upon the amount due by defendants than any other creditor, and the obligation of the defendants cannot be divided against their consent. *O'Brien* v. *Police Jury*, 355.

34. Where the demand of an intervenor does not grow out of the principal action, and is not specially permitted by law, it must be dismissed. C. P. 328. *Bryan* v. *Atchison*, 462.

35. A third person, who claims to be the owner of the land in controversy in a petitory action, has a right to intervene, and try his title in the suit, provided he call no other parties in warranty, nor in any other way arrest the progress of the litigation. *Haydel* v. *Bateman*, 755.

PLEDGE.

There can be no valid pledge of a note payable to order, where the note has not been endorsed by the pledgor, nor put into the possession of the pledgee, nor of any third person agreed on by the parties. C. C. 3128, 3129. *Fluker* v. *Bullard*, 338.

See DONATIONS, &c. 28.

POSSESSION.

1. Uninterrupted possession as owner, for more than a year, will exempt the party from liability in damages for acts of ownership done while such possession continued; and in such a case, an agent of the party in possession cannot be made liable for acts which his principal might have done without subjecting himself to damages. *Hood* v. *Stewart*, 219.

2. A possessor in good faith is entitled to be paid for the useful improvements made by him on the property. *Morris* v. *Covington*, 259.

3. A possessor in good faith, in case of eviction, is entitled to be paid for necessary improvements made even after judicial demand and judgment of eviction, such as clearings, levées, and ditches, without which the land could not have been so cultivated as to yield the rents and profits claimed by the plaintiff. *Beard* v. *Morancy*, 347.

4. One holding under a judicial sale must be considered as a possessor in good faith until judicial demand, and as such accountable, in case of eviction, for the fruits from that day only. *Ib.*

5. Where in an action of revendication instituted by a former possessor to recover a slave, both parties are in good faith, and claim under titles which they believe to be just, but neither has possessed under his title long enough to perfect it by prescription, their condition being equal the defendant cannot be evicted by a title not superior to his own. *Cavelier* v. *Moss*, 584.

6. The right of a joint owner to maintain a possessory action depends on the nature of his possession. While he continues to possess *nomine communi* the right does not exist; but where he has possessed *nomine proprio*, and in good faith, for more than a year, he is to all legal intents a just possessor, and in case of a disturbance by the other joint owner, the possessory action will lie. Nor will the fact of commencing a suit for a partition after the institution of the possessory action, in any manner affect the right to recover in the latter, where each party had possessed, for more than a year, a portion of the land in his own right. *Benton* v. *Roberts*, 749.

See Accession, 2. Sale, 12.

POSSESSORY ACTION.

See Pleading, II.

PRESCRIPTION.

I. *Lex Fori.*

1. The law of the forum governs questions of prescription. *Erwin* v. *Lowry*, 314. *Newman* v. *Goza*, 642.

II. *Commencement.*

2. Prescription will run in favor of a purchaser of land who has exercised no act of possession, only from the date of the recording of his title in the parish in which the land is situated. *Tear* v. *Williams*, 869.

III. *Of One Year.*

3. Actions for damages resulting from offences or quasi-offences, are prescribed by one year from the time when they were committed. *Goodloe* v. *Holmes*, 400.

4. A judicial sale made in execution of a judgment obtained by a wife against her husband, where no debt was due by the latter to her, is a mere nullity, and transfers no title to her. The prescription of one year, established by art. 1989 of the Civil Code, applies to actual contracts, made in fraud of creditors, by persons capable of contracting. It is inapplicable to such a simulated sale. *Dennistoun* v. *Nutt*, 483.

5. Actions by creditors to avoid contracts made by a debtor by which an illegal preference is given to certain creditors, are prescribed by one year. *Merchants Bank* v. *Bank of United States*, 659.

6. The claim of one whose occupation is that of a school-master, for the board and lodging of pupils, is prescribed by one year, under art. 3499 of the Civil Code. *Dwight* v. *Smith*, 759.

IV. *Of Three Years.*

7. The claim of an agent for compensation under an agreement allowing him a certain commission on disbursements, is not prescribed by three years. Such an agent is not included among the persons enumerated in arts. 3503, 3504, of the Civil Code. *Sullivan* v. *Williams*, 877.

8. Actions by factors on open accounts are not prescribed by three or five years. *Reynolds* v. *Rowley*, 890.

9. The post-notes issued by the Citizens Bank of Louisiana, payable to order, at three, four and five years from date, out of the proceeds of the sale of the bonds of the State loaned to that institution, formed a part of its capital and not of its circulation; and they are not exempted, on the ground of being circulated as money, from the laws applicable to stolen property. *Little* v. *Citizens Bank*, 976.

10. To entitle a possessor of stolen property to demand from the owner the price paid for it before the latter can obtain restitution of it, the possessor must show that he bought it at public auction, or from a person in the habit of selling such things. C. C. 3473. *Ib.*

11. To acquire property in moveables by the prescription of three years, the party must have possessed as owner. C. C. 3472. *Clay* v. *Fisher*, 997.

V. *Of Four Years.*

12. The action of a minor against his tutor is prescribed by four years, from the time of his majority. C. C. 356. *Gilbert* v. *Meriam*, 160.

VI. *Of Five Years.*

13. Actions on behalf of minors for restitution against acts committed in fraud of their rights, are not prescribed by five years. *Kemp* v. *Rowley*, 316.

14. The prescription of five years, established by art. 3505 of the Civil Code as to bills of exchange, applies to actions upon the instrument itself, for breaches of the contract of which it is the evidence. *Succession of Guillemin*, 634.

VII. *Of Ten Years.*

15. Actions to rescind or annul agreements on account of error, fraud, or violence, are prescribed only by ten years; to be calculated, in cases of error or fraud, from the day on which either was discovered, and, in cases of violence, from the day on which the violence ceased. C. C. 2218. Article 3507 of the Code applies only to cases not included in art. 2218. *Mulford* v. *Wimbish*, 443.

16. A judgment is not extinguished by the lapse of ten years. *Louisiana State Bank* v. *Haralson*, 456.

17. An action by a factor against his principal, for a balance of account, one item of which is for the amount of a bill accepted by the former for the accommodation of the latter, and paid by the acceptor, is prescribed only by ten years. C. C. 3508. The action is not upon the bill, but upon the contract for reimbursement between the drawer and accommodation acceptor. *Toledano* v. *Gardiner*, 779.

18. In an action by a factor on an account current between him and his principal, embracing their dealings in that relation, the latter will not be permitted to isolate the items, and apply to any particular item the prescription which might be applicable if it stood alone, and if the relation of factor and principal did not exist. The various items are component parts of one account, which is to be regarded as a whole, and the prescription applied to an action on such an account is that of ten years, established by art. 3508 of the Code. *Ib.*

VIII. *Of Thirty Years.*

19. The fact of having possessed separately a portion of the hereditary effects during thirty years, gives, in all cases, to the heir who has thus possessed, the right to oppose the suit of his co-heirs for a partition of those effects. C. C. 1228. The acquisition of this right is not suspended by the minority of any of the heirs. *Rankin* v. *Bell*, 486.

IX. *Interruption and Suspension.*

20. The acknowledgment of a debt will interrupt prescription, though such acknowledgment be not made to the creditor. *Erwin* v. *Lowry*, 314.

21. Acknowledgment of the debt by the maker of a note, does not interrupt prescription as to the endorser. The maker and endorser are not debtors *in solido*. *McCalop* v. *Newcomb*, 332.—*Hickman* v. *Stafford*, 792.

22. Where the maker of a protested promissory note, in settling certain partnership transactions with an endorser, transfers property to the latter on his agreeing to pay the amount of the note to the holder, it will amount to an acknowledgment of the debt by the maker, interrupting the prescription running in his favor, and may be taken advantage of by another endorser, who had been compelled to pay a part of the amount of the note. C. C. 3486. *Newman* v. *Goza*, 642.

23. The provision of art. 3491 of the Civil Code, that "prescription is suspended during marriage in every case when the action of the wife may be prejudicial to the husband", must be construed with reference to the french text. That article is taken from the Code Napoléon, and its meaning is settled in the jurisprudence of France, as embracing all cases in which the action of the wife would, if maintained, give the defendant, or any other person, a right of action against the husband. *McIntosh* v. *Smith*, 756.

24. Where a husband has sold paraphernal property of the wife's during marriage, and the action of the wife to recover it would give rise to a claim in warranty against him, prescription will be suspended during the marriage. C. C. 3491. *Brown* v. *Brown*, 834.

25. The acknowledgment of a debt by one joint debtor will not interrupt prescription as to his co-debtor. C. C. 3517. *Reynolds* v. *Rowley*, 890.

26. The acknowledgment of a debt made by one of two debtors *in solido*, or the institution of a suit and recovery of a judgment against one of them, will interrupt prescription as to the other; but it will commence immediately after the interruption, to run again as to the latter. *Millaudon* v. *Beazley*, 916.

27. The only demand which interrupts prescription is that made by a citation. *Grayson* v. *Mayo*, 927.

28. The institution of an action, and re-

covery of judgment, against one of two drawers of a joint and several bill interrupts prescription as to the other; but it will commence to run again as to the latter from the time of such interruption. *Per Curiam:* We cannot regard the effect of the judgment against one co-debtor *in solido* as extending to the other, so as to change the title of the creditor and clothe the debt with a new character as to the latter; on the contrary he will remain a mere debtor on a bill, notwithstanding the merger into judgment of the liability of his co-debtor. C. C. 2092, 3505, 3517. *Hite* v. *Vaught*, 970.

29. Commercial partners being bound *in solido*, the acknowledgment of one interrupts prescription as to the other. *Parker* v. *Moore*, 1017.

X. *By or Against Whom may be Pleaded.*

30. A third possessor, sued in an hypothecary action, cannot plead that the notes given for the original debt are prescribed. Prescription is an exception which the debtor and his creditors alone can plead. The obligation subsists until they avail themselves of the prescription; courts of justice cannot supply it. *King* v. *Hickey*, 367.

31. The Civil Code has fixed no special prescription for judgments. Debts existing in that form are barred, if by any prescription, only by that of thirty years. *Louisiana State Bank* v. *Barron*, 405.

32. Heirs who have accepted a succession unconditionally, represent the deceased, and stand in his place both as to his debts and obligations, and a prescription which could not have availed him if alive, cannot protect them. C. C. 867, 939. *Ib.*

33. Reconventional demands are not exceptions within the meaning of the rule, *Quæ temporalia sunt ad agendum, perpetua sunt ad excipiendum.* The only exceptions to which that rule applies, are those which are attached to the action and inseparable from the demand. *Girod* v. *Creditors*, 546.

34. The rights of the creditors to plead prescription against notes of an insolvent which had been prescribed before the failure, cannot be affected by the fact of the insolvent's having placed them on his *bilan*. C. C. 3429. *Ib.*

XI. *When Pleaded after Appeal.*

35. Where prescription is pleaded, for the first time, in the Supreme Court, the party to whom it is opposed may require the case to be remanded for trial upon that plea. C. P. 902. *Fontenot* v. *Her Husband*, 780.

PRIVILEGE.

See MARRIAGE, 34. SHIPPING, 2. SUMMARY PROCEEDINGS.

I. *How Created.*

1. Privileges exist only in those cases in which they have been expressly granted by law. *First Municipality* v. *Hall*, 549. *Fontenot* v. *Soileau*, 774. *Shropshire* v. *Russell*, 961.

II. *On Particular Things.*

2. The vendor's privilege on moveables recognized by the Civil Code of this State, is unknown to the common law. *Copley* v. *Sanford*, 335.

3. In the distribution of the assets of a succession among its creditors, one who has absolutely sold and delivered a moveable, is, by the common law, a mere ordinary creditor for the price. *Ib.*

4. Where a vendor of moveables sold and delivered in another State, would have no privilege under its laws, he can have none in this State. *Ib.*

5. To entitle a party to the benefit of the privilege established by the Code in favor of architects, contractors, masons, workmen, and furnishers of materials, for the construction and repair of buildings, the amount due, or to become due, must be fixed in the contract, where it exceeds five hundred dollars. C. C. 2727, 3239. *First Municipality* v. *Hall*, 549.

6. Where a factor, by whom merchandise was received with directions to apply its proceeds to the payment of a bill, pays the bill before selling the property, he will be entitled, as factor, to a privilege on the merchandise, for his reimbursement. *Cutters* v. *Baker*, 572.

7. Factors have a privilege entitling them to be paid by preference to an attaching creditor, out of the proceeds of goods consigned to them, for any advance made thereon, or for any balance of account accrued anterior to the attachment, though not resulting from advances on the goods. C. C. 3214. Stat. 17 Feb. 1841. *Ib.*

8. The extreme term for the duration of privileges for work done, or materials furnished, for the construction of a steamer, is sixty days, where the boat has been for that length of time engaged in making trips between this port and those of other States. *Lee* v. *Creditors*, 599.

9. Privileges on steamers or other vessels established by the laws of other States, unless expressly recognised by our laws, will not be enforced here. *Per Curiam:* The framers of our Code did not intend to confine their legislation on the subject of the

privileges on steamers or other vessels to such as are owned in this State; they laid down general rules as to the distribution of the proceeds of such vessels, without regard to their origin, or the place of their owners' residence. *Ib.*

10. Privileges established by the laws of another State for work or labor furnished for the construction of a steamer form no part of the contract itself, and cannot follow the property into this State, when no such privilege exists here. *Ib.*

11. One who claims a privilege on a crop for the wages of her slaves employed in producing it, must assert it by way of third opposition; it is no ground for enjoining the sale of the crop. *Fisher* v. *Gordy*, 762.

12. Where a sale is made for cash, and the price paid at the time, no vendor's privilege can exist. *Fontenot* v. *Soileau*, 774.

13. The privilege granted by sec. 1 of the stat. 23 March, 1843, amending art. 3184 of the Civil Code, "for debts due for necessary supplies furnished to any farm or p antation", attaches to the crop of the current year for supplies furnished during that and the preceding year. *Barrett* v. *Chaler*, 874.

14. A keeper of public stables has no privilege on horses placed with him on livery, for money loaned to their owner, entitling him to be paid by preference to an attaching creditor. *Whiting* v. *Coons*, 961.

15. Profits made by a partner in the purchase and sale of merchandise, in which his co-partners are entitled to share, are not subject to any privilege in favor of the latter. *Shropshire* v. *Russell*, 961.

16. Where a vendor has no privilege by the law of the place of sale, he can acquire none by the transfer of the property to a country where a privilege would be granted to a vendor under such a contract made within its jurisdiction. *Colt* v. *O'Callaghan*, 984.

See EVIDENCE, 12. PARTNERSHIP, 7, 12.

III. *Registry.*

17. The privilege granted to an artificer or laborer, on the buildings or other works constructed by him, for the payment of his labor, will exist, as between the parties to the contract, though the work exceed five hundred dollars in value and the contract has not been registered with the recorder of mortgages. The parties to a contract cannot take advantage of its non-inscription. *Townsend* v. *Harrison*, 174.

18. To entitle a vendor of lands to a privilege against third persons, not proved to have had actual notice, the act of sale must be registered in the book of mortgages kept by the parish judge. A mere extract from the act of sale, not designating the property sold, nor even its nature, whether lands, slaves, or moveables, is insufficient; nor can such an imperfect registry be aided by the fact that, the notarial sale was recorded in the book of conveyances kept by the parish judge. C. C. 3238, 3241, 3349, 3350, 3351, 3353, 3356. *Ells* v. *Sims*, 251.

19. Where property sold in another State, by whose laws the vendor was entitled to a privilege, has been removed to this, by the laws of which it is considered an immovable, to preserve the privilege, the act of sale must be recorded in the mortgage office. C. C. 3238. *Copley* v. *Sandford*, 335.

20. The registry of an act of sale in the office of a parish judge, in the book in which both sales and mortgages were recorded, will preserve the privilege of the vendor, where, at the time of its registry, no separate book was kept for recording mortgages. *McKiernan* v. *Fletcher*, 438.

21. The effect of the registry of an act conferring a privilege ceases by the omission to re-inscribe it within ten years from the date of the first inscription. C. C. 3333. *Lataste* v. *Beraud*, 768.

22. Where an act of sale is inscribed among the notarial records in the office of a parish judge, but not registered in the separate volume kept by him for the inscription of mortgages, the privilege of the vendor will not be preserved. C. C. 3238, 3351, 3353. *Perot* v. *Chambers*, 800.

IV. *Effect and Rank.*

23. The privilege of the lessor is superior to that of the vendor, where the property sold has been delivered to the purchaser. Nor can the rights of the former be affected by a sale made by the lessee to one of his creditors, and a fraudulent removal of the property, by an agent of the purchaser, from the premises leased, for the purpose of placing it beyond the landlord's reach. C. C. 1965, 1972, 1977, 3185, 3230. *Dennistoun* v. *Malard*, 14.

24. In the distribution of the proceeds of a steamer sold under attachment, the creditors of the boat are entitled to a preference over one claiming a privilege as a vendor of the steamer. *Cammack* v. *Griffin*, 175.

25. Defendant sold certain lands, taking the notes of the purchaser for the price, and caused the act of sale to be registered. The purchaser re-sold the lands, and notes given to him for the price were subsequently, on his application to be declared a bankrupt under the act of Congress of 1841, surrendered to his assignee, and purchased by the plaintiff at the sale of the bankrupt's estate. The bankrupt was discharged, though opposed by defendant. *Held*, that the land not having formed part of the as-

sets of the bankrupt, and his discharge being merely personal, defendant's privilege as vendor, which was preserved by the registry of the sale, was unaffected. *McKiernan* v. *Fletcher*, 438.

PROHIBITION.

See COURTS, 6, 7.

PROVISIONAL SEIZURE.

1. The privilege given to overseers for their salaries by art. 3184 of the Civil Code, and that for necessary supplies furnished to any farm or plantation, are not included among those privileges which authorise a provisional seizure. A sequestration may be obtained whenever the creditor has a lien or privilege upon the property, on complying with the requisites of law, by previously giving bond, &c. (Act 7 April, 1826, s. 9. C. P. 276); but the writ of provisional seizure is restricted to certain enumerated cases of privilege, and issues without a bond. *Smith* v. *Smith*, 447.

2. It is only in the case of the seizure of ships or other vessels, that property provisionally seized can be released by the defendant on the execution of a bond in favor of the plaintiff. The right to bond property provisionally seized is given by sec. 12 of the stat. of 29 March, 1839. Sec. 18 of that stat. relative to the bonds given to release property so seized, must be considered as referring to the cases enumerated in sec. 12. *Bowles* v. *Wilcoxen*, 760.

See APPEAL, 7.

PUBLIC LANDS OF THE UNITED STATES.

1. Whatever name may have been inserted in the certificate of the board of commissioners of the United States, confirming a spanish grant, the confirmation must inure to the benefit of the real owner. *Jewell* v. *Porche*, 148.

2. A patent granted by the United States for land in Louisiana, which had been patented by the spanish sovreign, before the change of government, is, as to those claiming under the spanish patent, an absolute nullity. *Ib.*

3. The United States never so entirely divest themselves of title to public lands, until a patent is issued, as to be precluded from cancelling the sale and setting aside an entry illegally made. *Morancy* v. *Ford*, 299.

4. The Register and Receiver of the Land Office are the proper tribunal for determining, whether land claimed by a party is embraced in the prohibition of the proviso inserted in the act of Congress of 13 June, 1832, authorising the inhabitants of Louisiana to enter back lands, and, for that reason, not subject to be entered as a back concession. Their decision is subject to revisal by the Commissioner of the General Land Office, but not by the State tribunals. *Ib.*

5. The act of Congress of 23 January, 1832, relative to the pre-emption rights of settlers on public lands, only authorised the transfer of certificates of purchase, or final receipts. The prohibition to assign or transfer a mere pre-emption right, before a patent had been issued, imposed by the act of 29 May, 1830, was not repealed or affected by the stat. of 1832; any sale or assignment made in violation of it is null; and a title to the land, subsequently acquired by purchase from the government by the party entitled to the pre-emption, will inure to his benefit, and not to that of the purchaser of the pre-emption right. *Poirrier* v. *White*, 934.

See SALE, 13, 28.

QUASI-CONTRACT.

1. One who has made useful and necessary repairs to the road and levées on the lands of an absent proprietor, under an adjudication by the inspectors of roads and levées, is entitled to recover from the owner of the land the value of such improvements, with interest from judicial demand, on the principal that no man shall be permitted to enrich himself at the expense of another. *O'Reilly* v. *McLeod*, 146.

2. The owner of a tract of land fronting on a river, cannot be made to contribute to the cost of a levée made at right angles to the river, on property of another proprietor, and which was necessary to bring it into cultivation, although the levée may benefit both tracts. *Beard* v. *Morancy*, 347.

3. One who has made a levée, under an adjudication by the inspector of roads and levées under the provisions of the act. of 26 March, 1842, relative to roads and levées in the parish of Concordia, in case of the land not selling for the whole amount of the adjudication and the insolvency of the owner, may recover from the parish any balance due. *O'Brien* v. *Police Jury*, 355.

4. One who purchased certain lots, jointly with defendant, executing his notes with her *in solido* for the price, and who afterwards paid the notes at maturity, cannot recover from the latter her proportion of the notes so paid, where the evidence shows that defendant had been debauched by the plaintiff, and was living in concubinage with him at the time of the payment, which

was made as a reparation for the injury he had done to her. *Labenelle* v. *Deconet*, 545.

5. Where money has been paid to a factor for the use of his principal, to which it is afterwards discovered that the latter is not entitled, the factor will be liable to an action at the suit of the person from whom he received it, unless he has, before action brought, actually paid over the amount to his principal, or done something equivalent thereto. The mere passing of the money to the credit of the principal on the factor's books, will not exonerate the latter from liability. *Weld* v. *Shaw*, 559.

6. One who has paid for services rendered at a higher rate than that stipulated in the contract between the parties, cannot recover the amount so overpaid, where the original contract was a hard one, and the amount paid not more than a fair compensation for the services, and cannot be considered as having been paid in error. C. C 2280, 2281. *Jackson* v. *Ferguson*, 723.

RECEIVER.

Where in a suit for the settlement of a partnership the appointment of a receiver becomes necessary to effect the object of the suit, the court may appoint one. The power to do so belongs to the class of incidental powers. C. C. 21. C. P. 130. *Gridley* v. *Conner*, 87.

RECISION, ACTION OF.

See SALE, 17, 18, 26, 27, 35, 36.

RECORD.

See APPEAL, VII.

RECUSATION OF JUDGE.

1. A judge can recuse himself, only where the parties would have the right of recusing him. C. P. 340. *Beaulieu* v. *Furst*, 46.

2. A judge cannot recuse himself on the ground of one of his relations having an interest in the event of the suit. C. P. 338. *Ib.*

See APPEAL, 17, 18. JUDGMENT, 10.

REGISTRY.

See MORTGAGE, III. PRIVILEGE, III. SALE, III.

REHEARING.

See APPEAL, 67.

REVOCATORY ACTION.

See OBLIGATIONS, VIII.

RULE TO SHOW CAUSE.

See ATTACHMENT, 13, 14, SALE, 61. SUMMARY PROCEEDINGS.

SALE.

See PRIVILEGE, 2, 3, 4, 12, 16, 18, 19, 20, 22, 23, 24, 25.

I. *Conditions Essential to its Existence.*

1. S. intervened in the marriage contract between the defendant and her husband, and made a donation to the former of the right of habitation in a house, with certain rights of use upon a lot of ground, subject to the condition that, in case of a sale of the property by the donor, or of her death, the rights of habitation and use should cease. It was stipulated that, in either of those events, the donee should receive from the donor or her succession, a certain sum as an indemnity. The contract in which the donation was made was registered by the recorder of mortgages. S. subsequently mortgaged the property to plaintiff. The property was seized and sold by the latter, on a confession of judgment by S., and purchased by plaintiff at the sheriff's sale. The certificate of the recorder of mortgages produced at the time of executing the mortgage, showed the property to be free from mortgage, and made no mention of the donation; but the inscription of the marriage contract, and the encumbrance created by it, were notified to the bidders at the time of the sale. In an action by the purchaser to compel the donee to surrender the premises to him: *Held*, that the inscription of the marriage contract anterior to the execution of the mortgage, was notice to the plaintiff of its existence: and that the execution of the mortgage and the confession of judgment by the donor do not amount to a *sale* of the property, and cannot affect the donee's right to the servitude established in her favor. *Duclaud* v. *Rousseau*, 168.

2. Where from the plaintiff's own books a credit appears to have been given exclusively to a particular individual, he alone is liable for the debt. *Nugent* v. *Hickey*, 358.

3. Where a principal claims under a con-

tract of sale made by his agent, and does not deny the authority of the agent to make it, he will be bound by its terms. *Pellerin* v. *Dungan*, 383.

4. The contract of sale requires a concurrence of will both on the part of the vendor and vendee. *Bemiss* v. *Hawkins*, 500.

5. Where a party proposes to another to purchase merchandise from him for a certain price, and that the merchandise shall be shipped to him at particular place, to be there paid for before delivery, to which the latter assents, the sale will be perfect from the moment of the agreement for the object and the price, and the subject of the sale will be thenceforth at the risk of the purchaser, though not delivered to him; and if it perish before delivery, without the fault of the seller, he will be exonerated from the obligation to deliver, but the purchaser will be bound for the price. C. C. 1903, 2431, 2442. *Alling* v. *Bach*, 746.

See 47, 48, *infrâ*.

II. *Things which may be the Object.*

6. Property claimed in an action cannot be alienated, pending the action, to the prejudice of the party claiming it. C. C. 2428. *Jones* v. *Hunter*, 254.

III. *Registry.*

7. One aware that another had purchased land from a third person, and that the purchaser was in possession, but had failed to have his title recorded in the parish in which the land was situated, from whatever source such knowledge may have been derived, can acquire no title to the property to the prejudice of the purchaser. *Splane* v. *Mitcheltree*, 265.

8. Acts of transfer of immovables, whether passed before a notary or not, have effect against third persons only from the time of their registry in accordance with the stat. of 20 March, 1827. The stat. of 26 January, 1838, making it the duty of notaries in New Orleans to cause to be registered in the conveyance office all acts passed before them, which by law ought to be so registered, does not exempt the party to whom the immovable is transferred from the duty of seeing that it is so registered; that statute may give him recourse against the notary, but does not affect his rights as against third persons. *Crear* v. *Sowles*, 597.

9. The registry in the conveyance office of a copy of an act of sale of immovables situated here, executed before a notary in another State, whose official capacity is attested by the secretary of state under the great seal of the State, the copy being certified by a notary in this State to be a true one from an original instrument deposited in his office, is sufficient, without further proof of the execution of the act, to make the registry notice to third persons. Stats. 20 March, 1827; 17 March, 1828. *Merchants Bank* v. *Bank of United States*, 659.

10. An act of sale of land must be registered in the office of the parish judge of the parish in which the land is situated, to have effect against third persons, either as transferring title or possession. It is not sufficient that it be recorded in the office of the register of mortgages. Art. 2455 of the Civil Code, which declares that "the law considers the delivery of immovables as always accompanying the public act transferring the property," is subordinate to those articles which require the registry of acts of sale in the parish in which the land is situated. *Tulane* v. *Levinson*, 787.

11. Notice is not equivalent to registry in relation to conveyances of real property. *Ib.*

12. Where acts of sale under which a title to land is set up have never been recorded in the parish in which the land is situated, and no act of possession is proved to have been exercised by the purchasers, the acts of sale can have no effect, as to third persons, as transferring either title or possession. *Tear* v. *Williams*, 868.

13. Titles to land held under claims reported for confirmation by commissioners of the United States, whose report has been approved by act of Congress, emanating from the sovereign authority, need not be recorded. *Ib.*

14. Art. 2417 of the Civil Code, which provides that a sale of immovables or slaves *sous seing privé* has effect against the creditors of the parties and against third persons in general, only from the day of its registry in the office of a notary, *and* the actual delivery of the thing sold, must be considered as controlling art. 2242 which declares such sales to be valid from the dates of their registry in the office of a notary, or from the time of the actual delivery of the thing sold. *Lindeman* v. *Theobalds*, 912.

IV. *Delivery.*

15. By a sale of a plantation with the improvements thereon, whatever is immovable by destination or the object to which it is attached, passes to the purchaser. Gathered corn, staves, materials for building which though upon the place and prepared for use have not been actually used, and furniture not permanently attached to the house, are moveables, and do not pass to the purchaser. *Nimmo* v. *Allen*, 451.

16. One who purchases *per aversionem* cannot sue for a reduction of price. C. C. 2471. *Roubieu* v. *Michel*, 808.

V. *Warranty.*

17. Where a slave was diseased at the time of the sale, to the knowledge of the vendor, and the disease is proved to have rendered her use so inconvenient and imperfect that it must be supposed the purchaser would not have bought her if he had been aware of its existence, she becoming incapable shortly after the sale of doing the work for which she was sold and continuing so, the sale will be rescinded, and the vendor condemned to repay the price, with interest from the day of sale, and the cost of her medical treatment while in the hands of the purchaser. *Johnson* v. *Johnson*, 67.

18. Where a slave sold as "pleinement garantie des vices et maladies prévus par la loi, à l'exception qu'elle est un peu oppressée," proves to have been so affected with asthma, anterior to the sale, that it must be supposed the buyer would not have purchased her, had he known of the disease, the sale will be rescinded. The statement in the act of sale that the slave was *un peu oppressée*, was not a clear announcement of the disease with which she was affected. A vendor is bound to explain himself clearly; and any obscure or ambiguous expression must be construed against him. C. C. 2449. *Robert* v. *De St. Romes*, 135.

19. Where a purchaser has paid the price, he has no recourse against his vendor until finally evicted, when he may call him in warranty. C. C. 2538. *Hopkins* v. *Van Wickle*, 143.

20. A purchaser can acquire no greater right than his vendor possessed. *Ib.*

21. Third persons, creditors of a purchaser holding under a title complete by the sale and delivery of the property, cannot be affected by secret equities between the vendor and purchaser. *Bookout* v. *Anderson*, 246.

22. To authorise a purchaser to resist payment of the price, or to require security against eviction, he must show either that his vendor had no title to the property sold, or that he has been disquieted in his possession, or has just reason to apprehend that he will be disturbed. C. C. 2535. C. P. 710. *Prendergast* v. *Perkins*, 384.

23. A purchaser, disturbed in his possession by the institution of a suit, cannot require security for any portion of the price which has been paid. C. C. 2538. *Dwight* v. *Carson*, 459.

24. Where the bills of sale for a crop are made out in the name of the factor, and the receipts of payment are signed by him, he will be liable personally to the purchaser for any deficiency in the quantity actually delivered, though the purchaser knew, at the time of the sale, that the party from whom he bought was acting as agent. *Weld* v. *Shaw*, 559.

25. To make a vendor liable under his warranty, the purchaser must be evicted by some lawful authority. *Per Curiam:* The latter must maintain and vindicate his possession against intrusion, or any force but that of the law itself. *Morris* v. *Kenton*, 722.

26. Where a disease with which a slave was affected at the time of the sale terminates fatally within three months thereafter, without any fault of the purchaser, and the evidence shows that both the vendor and vendee were ignorant of its existence at the time of the sale, the vendor will be bound only to restore the price, and to reimburse the expenses occasioned by the sale and those incurred for the preservation of the thing sold; the cost of a *post mortem* examination, and the expenses of interment, are not a part of the charges for which he is liable. C. C. 2509. *Harvey* v. *Kendall*, 748.

27. Where the purchaser of a slave for cash sues to recover back the amount paid by him, with damages, on the ground of the death of the slave from a redhibitory disease with which he was affected at the time of the sale, the vendee will not be allowed any thing for the services of the slave, the use of the money being an offset to his services. *Ib.*

28. The frequent errors committed by the surveyors of the United States in the surveys of lands in this State, are matters of history; and without some other action on the part of the government than the approval by the surveyor general of the survey on which land is designated as belonging to the United States, the title of a purchaser of the land cannot be considered as disturbed, much less will such an approval be regarded as proof that the land belongs to the public domain. *Roubieu* v. *Michel*, 808.

29. Land subject to a mortgage was sold by the mortgagor to defendants, who sold to a third person, by whom the land was sold to a fourth, who was evicted by a sale at the suit of the mortgagee. Plaintiff having acquired at a judicial sale the claim of the last purchaser against his vendor, this vendor subrogated the last purchser to all his rights of warranty against defendants, and the last purchaser subrogated the plaintiff to all his rights of action against his vendor, and against defendants. *Held*, that plaintiff's action can not be defeated on the grounds, that defendants' vendee had no cause of action against them until he was himself injured by eviction, and that he could not assign a right which he had not. *Per Curiam:* We see no objection to the subrogations under which plaintiff claims; they promote the ends of justice, and tend to prevent a multiplicity of suits. *Lynch* v. *Kilchen*, 843.

30. Where an act of mortgage contains the pact *de non alienando* it is not necessary

that the party in possession should be apprized of the seizure, nor is it necessary that the latter should notify his warrantors, in order to preserve his recourse against them. *Per Curiam:* The defence which warrantors can make against an action of mortgage is not such as would in any case release them from their warranty. C. C. 2494. *Ib.*

31. One subrogated to the rights of a purchaser who has been evicted, is entitled to recover from his warrantors any part of the price which the purchaser had paid at the time of his eviction. *Ib.*

32. Where a husband joins in an act of sale of real property made by his wife merely for the purpose of authorizing her, the purchaser, in case of eviction, can recover judgment only against her. *Ib.*

33. Where an appeal taken by the purchasers of a tract of land, and their warrantors, from a judgment by which the former are evicted, does not stay execution, the judgment in favor of the former against the latter should bear interest from its date. *Tear* v. *Williams*, 868.

34. Fees of counsel, as a part of the expenses necessarily incidental to the defence of a suit by which a purchaser is evicted, may be recovered against his warrantors. C. C. 2482. *Ib.*

35. Plaintiff cannot recover in an action to rescind the sale of a slave for a redhibitory disease, where an offer to return the slave is neither alleged nor proved. *Back* v. *Barrett*, 955.

36. Where a party contracted with another to deliver merchandize for a certain price, the latter binding himself to pay the price, under a fixed penalty in case of noncompliance on his part; and the purchaser notifies the seller of his inability to comply and declares the contract null, it will amount to an active breach of the contract, and the seller will not be bound to tender the goods to enable him to recover the penalty. *Green* v. *Fonbene*, 957.

See 45, 46, 56, 58, 69, *infrá*.

VI. *Obligations of Purchaser.*

37. Legal interest is due from maturity, and without putting the maker in default, on a note given for the price of property producing fruits. C. C. 2531. *Balph* v. *Hoggatt*, 462.

38. Where one to whom slaves sold at the suit of a second mortgagee are adjudicated, enters into a bond to produce them whenever required for the purpose of being sold under the first mortgage, and subsequently dies, a purchaser of the slaves at a probate sale of his succession, will acquire only the rights of the deceased, and will be bound by his obligation to deliver the slaves. Such a purchaser cannot be considered a third possessor; nor can he require the original vendor to resort to an hypothecary action to enforce his mortgage. *Stanbrough* v. *Evans*, 474.

39. Where on the refusal of the purchaser to comply with the contract for the sale of merchandize, the vendor sells it at the risk of the former, it is not necessary that the sale should be in all cases at auction. By the breach of the contract the vendor becomes the trustee of the purchaser, to dispose of the merchandize in good faith and with reasonable diligence; and where the property is sold for a fair price, though not at auction, the amount for which it is sold will fix the liability for damages for the breach of the contract. *White* v. *Kearney*, 639.

40. Where the corporation of a city, under authority conferred on them by law, take possession of a town lot, and dedicate it to public use, interest on the price will be due from the time of their taking possession. *Per Curiam:* Town lots in the improved parts of a city, are productive property, C. C. 2531. *Lawrence* v. *Second Municipality*, 651.

VII. *Cession of Incorporeal Things.*

41. The purchase of a judgment, from which no appeal can be taken, and which is not subject to be annulled, is not the purchase of a litigious right. The purchase of such a judgment, by an attorney at law is not prohibited by art. 2422 of the Civil Code. *Denton* v. *Willcox*, 60.

42. The right granted by art. 2622 of the Civil Code, to a person against whom a litigious right has been transferred, of releasing himself by paying to the transferree the real price of the transfer, with interest from its date, can be exercised only during the continuation of the litigation. When judgment has been rendered the litigation has ceased, and with it the defendant's right. *Marshall* v. *McCrea*, 79.

43. A having purchased at judicial sale property sold as belonging to the succession of B, assumed, as part of the price, the payment of a note secured by mortgage on the property. Pending an action by the heirs of the surviving wife of B, claiming one half of the property, on the ground that the whole belonged to the community of acquêts formally existing between the spouses, an attorney at law, practising in the court in which the suit was pending, purchased the mortgage and note: *Held*, that the purchase, being by a public officer connected with the court, was a nullity, C. C. 2422. *Morris* v. *Covington*, 259.

44. The purchase of a litigious right by an attorney practising in the court in which

the litigation was pending at the time of the sale, is null. C. C. 2422, 2623, 3522, § 22. *Copley* v. *Moody*, 487.

45. The vendor of a debt or incorporeal right warrants its existence at the time of the transfer, though no warranty be mentioned in the act of sale (C. C. 2616), and that it exists such as the parties understood it, accompanied with all the securities contemplated by the contract of assignment. *Toler* v. *Swayze*, 880.

46. One who sells a judgment obtained against several persons *in solido*, impliedly warrants that the judgment exists as it purports to do; and if, at the time of the sale, one of the debtors had been discharged, the vendor will be liable on his warranty. *Aliter*, if the purchaser, at the time of acquiring the judgment, was aware of collusion and frauds between the vendor of the judgment and other parties to it, by which one of the debtors had been discharged. *Ib.*

See PUBLIC LANDS OF UNITED STATES, 5.

VIII. *Judicial Sales.*

47. Where property of a succession, ordered, at the instance of the tutor of certain minor heirs, to be sold after being appraised, is adjudicated to a purchaser for a price less than one-half of its appraised value, the sale is null. *Succession of Packwood*, 96.

48. Where a debtor, whose property has been sold under a *fi. fa.*, receives from the sheriff the surplus of the proceeds of the sale remaining after payment of the judgment creditor, it amounts to a ratification of the sale, and will preclude the debtor from disturbing it on account of any informalities in the execution of the writ. *Headen* v. *Oubre*, 142.

49. The nature of the evidence upon which a judgment is obtained—whether by the confession of the debtor or otherwise, does not affect the general rule that, in sales under execution, the law neither requires nor presumes the assent of the debtor. Such a sale can never be considered a voluntary one. *Duclaud* v. *Rousseau*, 168.

50. Proceedings under the stat. of 10 March, 1834, relative to the titles of purchasers at judicial sales, cover matters of form only. *Johnson* v. *Hamilton*, 206.

51. The title of one who purchases property, sold under execution issued on a judgment from which a devolutive appeal had been taken, will not be affected by the reversal of the judgment. *Farrar* v. *Stacy*, 210.

52. A sale made under a judgment rendered in an action in which there was no defendant, is a nullity, The nullity of such a sale, is not required to be pronounced judicially, *Morris* v. *Covington*, 259.

53. Where a purchaser at a judicial sale fails to comply with its terms, his acts may be treated as nullities. *Rowley* v. *Kemp*, 360.

54. The surety of a purchaser at a judicial sale is not bound *in solido* with the principal. *Tildon* v. *Dees*, 412.

55. Where a mortgage stipulates that on the mortgagor's failure to pay the debt the property may be seized and sold for cash, without appraisement, but, in the petition for an order of seizure and sale, the right to sell without appraisement is not claimed, and the petitioner prays that the property "may be seized and sold as the law directs," and the judge directs that "an order of seizure be issued as prayed for, and the property sold as the law directs," but in the writ issued by the clerk on this order, the sheriff is directed to sell for cash, without appraisement, and the property is sold accordingly, and purchased for an inconsiderable price, the sale will be null. The stipulation for a sale for cash without appraisement, was waived by the party for whose benefit it was made, by his claiming a seizure and sale according to law—that is, by observing the formalities ordinarily required in proceedings *viâ executivâ*, one of which is the appraisement of the property. The clerk was not authorised under this order, which was made in accordance with the prayer of the petition, to direct the sale to be made without appraisement. *Union Bank* v. *Bradford*, 416.

56. A purchaser at a judicial sale of the effects of a bankrupt, acquires no greater rights than the bankrupt himself had in the property sold. *McKiernan* v. *Fletcher*, 438.

57. Where a house and lot, which had been for some time in the hands of the sheriff under seizure, and from which he had received an amount in money for rent, is advertised for sale, and sold "with all the rents and revenues accruing thereon," the advertisement must be considered as referring to the rents accruing after its date. The purchaser cannot claim the rent previously received by the sheriff, which was money in his hands to be credited on the execution. *Per Curiam:* The object of judicial sales is to convert property into money. The sale by a sheriff of money in his hands under seizure, is a proceeding unheard of. *Brashear* v. *Hudson*, 450.

58. A purchaser at a sheriff's sale, who has been evicted, cannot maintain an action against the seizing creditor alone; he must proceed against the creditor, and the debtor in execution, jointly. C. P. 711. The fact that the domicil of one of the parties is out of the State, is no obstacle to the

exercise of the remedy provided by art. 711 of the Code of Practice. *Gaines* v. *Merchants Bank*, 479.

59. A judicial sale, made at the suit of a mortgage creditor, will not be treated as null for informalities anterior to the order of seizure, except in cases of an actual want of citation, nor for informalities posterior to it not involving the violation of a prohibitory law. *Broughton* v *King*, 569.

60. The provision of the constitution, art. 69, that all process shall be issued in the name of the State, is directory to those charged with the issuing of judicial process. It regulates a mere matter of style; and its non-observance in a judicial sale cannot affect the title of a purchaser. *Ib.*

61. The validity of a sheriff's sale cannot be tested by a rule, taken by the purchaser on the plaintiff in execution. to show cause why the adjudication should not be set aside. *Muir* v. *Henry*, 593.

62. A debtor in whose possession property is seized to satisfy his vendor's mortgage, who, after noticce of the proceedings, appears at the sale and purchases the property, cannot afterwards complain of any irregularities in the proceedings, nor can they affect the title to the property in his hands. *Ib.*

63. A sale under a *fi. fa.* issued on a judgment the amount of which exceeded three hundred dollars, made after the promulgation of the stat. of 8 Feb. 1842, and before the stat. of 6 April, 1843, in a parish in which a newspaper was published at the time, and not advertised therein, will be annulled. Art. 669 of the Code of Practice, and the amending act of 28 Feb. 1828, were revived by the stat. of 8 Feb. 1842, repealing that of 8 March, 1841 *Freeman* v. *Stacy*, 615.

64. The fact that the discontinuance of a newspaper rendered it impossible to publish the advertisement of a judicial sale therein as often as required by art. 669 of the Code of Practice, will not excuse the omission to publish such advertisement before the discontinuance of the paper. *Ib.*

65. Where a sheriff's deed for property sold at judicial sale, after enumerating several special mortgages, recites that the property was sold "subject to the mortgages specified," the recital will add nothing to the consequences which the law attaches to the adjudication made by the sheriff, nor to the obligations of the purchaser. *Per Curiam:* A sale under execution may be made for a sum fixed, and for the additional amount of previous mortgages; but, unless such appear distinctly to be the terms upon which the property was offered, the purchaser will not be presumed to have given more than the sum bid by him. *Loucks* v. *Union Bank*, 617.

66. The fact that the sum for which property was adjudicated at a judicial sale, is less than the amount of previous special mortgages, will not prevent a sale, where the previous mortgages are in favor of the judgment creditor. C. P. 683, 684. Where the owner of such previous encumbrances appears at the sale and assents to the adjudication, no other party can complain of the insufficiency of the price. *Ib.*

67. Nullities resulting from the non-observance of the formalities required in the alienation of the property of a minor, can be taken advantage of by him alone, and may be cured by his express or implied ratification after coming of age. They can only be taken advantage of in a direct action, before the proper tribunal. *Bank of Louisiana* v. *Delery*, 648.

68. A probate sale made to effect a partition cannot be set aside, unless all who are interested be made parties to the proceeding. *Ib.*

69. Where a purchaser of property sold under execution is evicted, the plaintiff in the execution, cited in warranty, can be condemned to pay legal interest only from the date of the purchase. *McIntosh* v. *Smith*, 756.

70. A sale of property, subject to a special mortgage, made, under the laws in force anterior to the promulgation of the Code of Practice, without fraud or collusion, will not be set aside at the instance of the debtor or his heirs, though the property did not sell for enough to satisfy the nominal amount of the encumbrance, where the debt had been in fact greatly reduced at the time of the sale, and the mortgage creditor, having been paid by subsequent sales of other property included in the mortgage as liable for his debt, does not complain of any injury therefrom, nor objects to the application of the proceeds to the extinguishment of other debts. *Robinett* v. *Compton—Rehearing*, 861.

71. A purchaser at a probate sale will not acquire the property free from mortgages created by the deceased, where there was an express stipulation, at the time of the sale, that the adjudication should not discharge the encumbrances. *Grayson* v. *Mayo*, 927.

See Execution of Judgment, IV. Marriage, 23. Successions, V.

IX. *Simulation.*

72. A simulated sale vests no title whatever in the pretended purchaser, and may be disregarded by a judgment creditor in executing a *fi. fa.* It is not subject to the rules governing real contracts which operate injuriously to creditors, and which can

only be avoided by a direct action. *Hobgood* v. *Brown*, 323.

73. Where a married woman, for the purpose of shielding certain lands from a creditor, conveys them to a third person by a simulated sale, her heirs, on proof of the existence and contents of a counter-letter by which the purchaser acknowledged the simulation, and of its concealment, or destruction by the latter, may recover the land, with damages, profits and rents. *Aubie* v. *Gil*, 342.

74. Continued possession by a vendor, acting as owner, after a sale, creates the presumption of simulation, and imposes on the vendees, as to third persons, the burden of proving the reality of the sale. C. C. 2456, 1915. The mere fact of the vendor, who was the mother of the vendees, continuing to live with her children on the place sold after the transfer, is not of itself a badge of simulation. *Lindeman* v. *Theobalds*, 912.

75. Where a party enjoins an execution against a third person, claiming the property seized by virtue of his possession under an act of sale duly registered, and defendant prays for the dissolution of the injunction on the ground that the sale was simulated and fraudulent, he must establish the simulation, or the injunction will not be dissolved. In such an action evidence will not be admissible to prove that the sale was fraudulent; for where there has been a real, though fraudulent, sale, detrimental to creditors, the title and possession of the purchaser cannot be disregarded; the creditor can only reach the property by causing the sale to be annuled in a direct revocatory action. It is only in cases of simulated sales, not intended by the parties to convey any property, that the creditor may disregard the title of the purchaser and seize. *Ib.*

See Evidence, 3, 82. Prescription, 4.

SEQUESTRATION.

1. In an action for damages against the sureties in a sequestration bond, the fact that judgment was rendered for the defendant in the suit in which the sequestration was taken out, will not alone be noticed; the reasons given for the judgment will be considered, and where they show that judgment was affirmed in favor of the defendant on the ground that courts of justice should not lend their aid to either party to enforce a contract entered into for purposes reprobated by law, nominal damages only will be given. *Clarke* v. *Scott*, 907.

2. A party may proceed by a motion to dissolve, in case of a sequestration. *Per Curiam:* A sequestration is a harsh remedy, and, if sued out without cause, the party whose property is unlawfully taken from him should have a summary redress. *Crawford* v. *Jones*, 826.

3. A sequestration will be allowed to issue only where the party is clearly entitled to it. *Shropshire* v. *Russell*, 961.

4. In action by one partner against another to compel him to account for and pay over the share of his co-partner in profits alleged to belong to the firm, plaintiff is not entitled to a sequestration. *Ib.*

See Provisional Seizure, 1.

SERVITUDE.

1. The provision of art. 552 of the Civil Code, which authorises one by whom an usufruct has been established, to dispense, in favor of the usufructuary, with the security required by that and the preceding article, must be construed with reference to art. 1485, which prohibits testators from disposing of the legitimate portion to the prejudice of their descendants. One who has the usufruct of property forming part of the legitimate portion of the descendants of the person by whom the usufruct was established, cannot be relieved from giving security. *Depas* v. *Riez*, 30.

2. By the laws of Spain, servitudes were divided into the two classes, of *urban*, or those which one house enjoys on another, and *rustic*, or those which one estate enjoys on another. Partida 3, tit. 31, law 1. The servitude of view is exclusively *urban*, such as a house only can acquire on another. Such a servitude could never be acquired by unimproved lands on other lands. Partida 3, tit. 31, law 2. *French* v. *New Orleans and Carrollton Railroad Company*, 80.

3. By the spanish laws a servitude could be acquired in one of three ways only: first, by an express grant for a valuable consideration; second, by last will; or thirdly, by use and lapse of time. *Ib.*

4. Where a proprietor of lands dedicates to public use two streets, reserving a strip of land between them, the use made by him of the land so reserved at the time of the dedication, will not deprive him, or his assigns, of the right of applying it afterwards to other uses. *Ib.*

5. Where the owner of ground in a city, in dividing it into lots, reserves a part of it adjoining to a contiguous proprietor and extending the whole length of the property, for a public alley, and after selling one of the lots with reference to a plan on which the alley is described and as fronting on the alley, sells the remaining lot, as well as his property in the soil of so much of the alley as is adjacent to the second lot, subject to

the servitude of way previously established in favor of the lot first sold, the second purchaser will hold the property acquired by him, subject to the servitude of way established in favor of the first lot; but the servitude, will not exist in favor of any owner of the contiguous property on the other side of the alley; and the purchaser of the second lot and right to the soil of the adjacent alley will have the right, common to every proprietor, of erecting a wall or fence upon this boundary line separating his property from his neighbors, the right not being incompatible with the servitude of way. *McDonogh* v. *Calloway*, 518.

6. Any individual member of a town corporation may sue for the abatement, as a nuisance, of a warehouse erected by an individual, for his private emolument, on the bank of a navigable stream within the corporate limits. *Per Curiam:* Public places within the limits of a corporation cannot be appropriated to private use; and individual corporators, as well as the officers of the corporation, have a right to prevent such appropriation, and to sue for the demolition and removal of the buildings. Art. 859 of the Civil Code does not authorise the erection of buildings for private emolument. *Herbert* v. *Benson*, 770.

7. Municipal corporations are not established for the exclusive advantage of the corporators, but for the public at large; and an agreement by which a person is permitted to erect a warehouse on a public place, authorising him to exact from other inhabitants of the parish any rate of storage provided none was claimed from the corporators, is not one intended for the public utility. *Ib.*

8. The owner of property subject to an usufruct has alone the right to call the usufructuary to account. *Girard* v. *New Orleans*, 897.

See Evidence, 30. Sale, 1.

SHERIFF.

1. A sheriff, at whose request judicial advertisements have been published, will be liable for the costs of publication, in the absence of proof of any agreement by the publisher to look to others for remuneration. *Downes* v. *Scott*, 399.

2. Sheriffs were liable, before the stat. of 7 April, 1826, s. 17, to the party injured, for any damage sustained by their illegal acts or neglect. That statute gives an additional remedy in cases for which it provides; but it cannot be construed as subjecting the sheriff to the payment of the amount for which a *fi. fa.* was issued, as a penalty for a mere failure to return the writ on or before its return day. It provides a summary remedy, by motion, after ten days notice, in cases of failure to return writs of *fi. fa.* on or before the return day, or to pay over money received thereon to the party entitled to receive it, or to his attorney, unless good cause be shown for such failure, as the inability of the sheriff to effect a sale before the return day, or that the writ had been enjoined, or payment of the sum collected suspended by order of a competent tribunal. *Gasquet* v. *Robins*, 408.

3. The return on a *fi. fa.*, made by a sheriff after the return day, that he had demanded of the debtors money to satisfy it, but that they refused to give either money or property, will not exonerate the officer from liability under the stat. of 7 April, 1826, s. 17. On the refusal of the debtor to satisfy the writ or to give up property, the sheriff should have called on the creditor to point out property. C. P. 726, 727. It is only where the debtor has made a surrender of his property, that this demand becomes unnecessary. *Ib.*

4. Where a sheriff, by whom a twelve-month's bond has been taken for the price of property sold under execution, neglects to return the writ, and retains the bond in his hands for more than eleven months, and until, in consequence of his failure to return it, it is destroyed, he will be liable to the creditor for its amount. The bond belonged to the creditor, who had a right to require its delivery upon paying the costs; and the return of the writ would have informed him that a bond had been taken. C. P. 716. *Ib.*

5. A sheriff condemned to pay to the creditor the amount of a *fi. fa.* in consequence of his neglect, is entitled to be subrogated to the rights of the latter against the defendant in execution. *Ib.*

6. Where a sheriff fails to return a *fi. fa.* directed to him and put into his hands, and shows nothing which can excuse his failure to execute or to return the writ, the plaintiff in execution will be entitled to judgment against him for the amount for which the writ was issued. An allegation that the debtor was insolvent, where no surrender had been made by him, is not of itself sufficient to excuse the neglect. *Magee* v. *Robins*, 411.

7. A sheriff is responsible to the owner for any damage resulting from his neglect to take proper care of property taken into his possession under an attachment. *Whitton* v. *Jones*, 802.

8. Where a sheriff, charged with the sale of property under execution, adjudicates it to a purchaser on condition of his executing a twelve-months' bond with surety, and subsequently perfects the adjudication without obtaining any surety on the bond,

his neglect will place him in the surety's stead, and render him personally liable for the whole amount of the bond. *Overton* v. *Ricord*, 805.

9. Where, through the negligence of a sheriff, an opportunity is afforded to a debtor of removing into another State property seized under attachment, and plaintiff thereby loses his recourse against it, judgment may be recovered against the sheriff, and his sureties, *in solido*, for its value. *Sandrige* v. *Jones*, 933.

10. Under ordinary circumstances a sheriff will be considered as having exhibited due diligence, by serving a citation in time to enable plaintiff to take a default at the earliest period after the opening of the court at the term next ensuing. To render a sheriff liable for damages resulting from the failure to serve a citation sooner—as for the amount of the debt, when the citation was not served in time to interrupt prescription—plaintiff must show that the officer was notified of the necessity of earlier service to prevent the prescription of the claim. *Bloomfield* v. *Jones*, 936.

11. Where a sheriff of another State, who had acquired possession and a special property in goods seized under an attachment, before issue joined in the action, without the authority of the law or of the parties litigant, ships the goods to this State, with instructions to an agent to sell them at private sale, he will thereby divest himself of any special property in the goods, and the original owner may resume his control over them here, or they may be seized at the suit of one of his creditors. *Dick* v. *Bailey*, 974.

See Attachment, 22. Evidence, XX. Execution of Judgment, 15. Offences, &c. 18.

SHIPPING.

1. The owners of a steamer, chartered to, and in the possession of, a third person, will not be liable for services rendered to the vessel, while so chartered, to the knowledge of the party by whom the services were rendered. *Pontchartrain Railroad Company* v. *Heirne*, 129.

2. The 9th sec. of the stat. of 20 January, 1830, incorporating the Pontchartrain Railroad Company, while it grants to that company a privilege on vessels or other property liable for the costs of warehousing, wharfage and transportation, imposes no personal liability on the owner for services rendered to a steamer while chartered to a third person. *Ib.*

3. A consignee will not be liable for the freight of property which was never delivered to him, where it is not shown that he ever accepted the consignment, or authorised the entry of the property at the custom-house by the consignor, who took possession of it. *Perret* v. *Sauvinet*, 559.

4. The owners of a steamer will not be liable for the value of goods shipped under a bill of lading containing the exception of "unavoidable accidents and dangers of the river", and lost in consequence of a collision with another boat, where there was no fault or carelessness on the part of those who had charge of the steamer on which the goods were shipped, and it was not in their power to prevent the collision. Such a loss is the result of an unavoidable accident, or danger of the river, within the meaning of the bill of lading. *Van Horn* v. *Taylor*, 587.

5. Where goods, stored on the deck of a steamer, to the knowledge of the shipper, who was a passenger, and without objection on his part, are lost overboard, in consequence of a collision with another boat, occurring without any fault on the part of those in charge of the steamer on which they were shipped, the shipper cannot recover their value from the owners of the steamer on which they were shipped, on the ground that they were lost from having been improperly stowed on deck, instead of in the hold. *Ib.*

6. If freight be not earned in consequence of events not attributable to the shipper, any advance made on it must be returned, unless there be an agreement to the contrary. *Hagedorn* v. *St. Louis Perpetual Insurance Company*, 1005.

See Evidence, 75. Lease. Mandate, 26. Obligations, 1, 2. Partnership, 14. Privilege, 8, 9, 10, 24. Provisional Seizure, 2.

SHREVEPORT.

The exclusive right granted to the corporation of the town of Shreveport by sec. 6 of the stat. of 20 March, 1839, to establish ferries across the Red River within the limits of that town, was not repealed by any thing in the stat. of 24 February, 1843, creating the parish of Bossier. *Douglass* v. *Craig*, 919.

SLAVE.

Slaves are not real estate. They are declared to be immovables by a positive provision of the Code (art. 461); but neither in common parlance, nor in law, are they designated by the term *real estate*. *Girard* v. *New Orleans*, 897.

See Courts, 4. Criminal Law, 1, 3, 4, 6, 7. Donation, 6, 7. Emancipation. Evidence, 6, 63. Offences, &c. 9, 17.

STATUTES, CITED, EXPOUNDED, ETC.

I. *Statutes of the United States.*

II. *Statutes of the State.*

III. *Statutes of Mississippi.*

SUBSTITUTION.

See Donations and Testaments, 12.

SUCCESSIONS.

I. *Order of Succession.*

1. Where a wife dies leaving neither ascendants nor descendants, nor legitimate relations, but natural brothers and sisters, and a husband not separated from bed and board, the surviving husband will inherit the estate to the exclusion of the natural brothers and sisters. C. C. 918. The last exclude only the State. C. C. 917, 923, *Succession of Duclosiange*, 98.

2. The adoption in art. 227, of tit. 2, book 3, of the Civil Code of 1808, of the general principle of the spanish law, that property acquired by one spouse from the other by donation before or after marriage or otherwise, or through the succession of a child, shall, in case of a second marriage by the surviving spouse, belong to the children of the first marriage, did not repeal the exceptions to that principle existing under the spanish laws. The principle must be considered to have been adopted here, subject to the limitations and modifications which belonged to it in Spain. *Urquhart* v. *Sargent*, 196.

3. A duly acknowledged natural child inherits the estate of her father, in default of legitimate relations or a surviving wife. *Jones* v. *Hunter*, 254.

4. Where an illegitimate child, not acknowledged by either parent, dies without issue, his estate will devolve upon his surviving wife, not separated from bed and board. C. C. 911, 918. *Succession of Briscoe*, 268.

II. *Transmission of Inheritance to Heirs.*

5. The succession of a deceased person is acquired by his heirs from the moment of his death, and with it the right to institute all actions which the deceased could have instituted; and this right of action is not suspended during the delays allowed by law to the heir to decide whether he will accept or renounce the succession. C. C. 934, 939. *Womack* v. *Womack*, 339.

III. *Rights and Obligations of Heirs.*

6. Where in consequence of the death of a child subsequently to that of the father, the surviving wife holds in common with the other children an undivided share in all the property of the father, she may, under art. 388 of Civil Code, cause the whole of it to be adjudicated to her, on complying with the requirements of that article. That article does not restrict the right to this adjudication to community property only; it makes no distinction as to the title by which property may be held in common between the surviving parent and the minor children. *Berteau* v. *O'Brien*, 162.

7. A testatrix living in Pennsylvania, having two children by her first husband, and one by a second, conveyed "in consideration of natural affection and of the sum of five dollars," to the last child, by deed, all her right and interest in certain lands represented by her as having belonged to her last husband. By her will, made several years after, she bequeathed all the residue of her estate, in equal portions, to her three children: *Held*, that though the sale be considered as a donation, the lands so conveyed would not be subject to collation, the terms of the conveyance showing unequivocally that it was the intention of the donor that the property should inure as an advantage to her son. *Urquhart* v. *Sargent*, 196.

8. In an action by a creditor against the

administrator of a succession, there is no occasion for the appointment of an attorney of absent heirs. *Johnson* v. *Hamilton*, 206.

9. The sale of the property of a succession does not amount to a partition among the heirs and widow in community. The sale is only a preliminary step to a partition; from its proceeds the debts and charges are to be deducted, and the residue is to be divided. *Dees* v. *Tilden*, 412.

10. A co-heir who purchases at the sale of the hereditary effects, is not bound to pay the surplus of the purchase money over the portion coming to him, until his portion has been definitively fixed by a partition. C. C. 1265. But this right is personal to the heir, and does not extend to a purchaser at a succession sale who subsequently acquires the interest of one or more heirs, or has made payments on account of the shares of other heirs. The amount which he will be entitled to receive as the purchaser of the rights of the heirs, being uncertain, and only capable of being determined upon a final partition, after payment of the debts of the succession, cannot be pleaded in compensation of a demand for the price of the property of the succession bought by him, the object of the demand being to collect the assets for legal distribution. On the final liquidation of the succession, the purchaser will be entitled to receive the portions of the heirs acquired by him, and the sums paid by him on account of the shares of others. *Ib.*

11. The designation of a notary before whom the inventory and appraisement are to be made, is only necessary where a partition is to be made in kind. In cases of licitation it is unnecessary; in such cases an appraisement made before the sale, in the mode usual in seizures under execution, is sufficient. *Molinari* v. *Fernandez*, 553.

12. In an action against heirs for a debt due by their ancestor, judgment must be rendered against each for his proportional share in the succession. *Williams* v. *Dunn*, 806.

13. The rights of creditors are fixed at the time of the debtor's death; and no one is permitted by superior diligence, or by dealing with the executor, to get an advantage over others. *Boyce* v. *Escoffie*, 872.

14. The homologation of a "statement of debts" on which a creditor of a succession is placed as an ordinary creditor, presented by a curator with a prayer for its approval and homologation, is not such a judgment as will prevent the creditor from afterwards claiming the benefit of a mortgage by which his debt was secured. Such a statement presupposes sufficient funds in the hands of the curator to pay all the creditors who have presented themselves (C. C. 1168); and it is immaterial to a creditor what rank is assigned him thereon, as it contemplates the payment of his debt at all events. He is consequently not bound to oppose it, and insist on being classed as a mortgage creditor. It is only upon the presentation of a tableau of distribution among the creditors, according to the order of their privileges and mortgages, that a judgment could have been rendered which would preclude a creditor from subsequently asserting his true rank. C. C. 1169, 1170. *Succession of Day*, 895.

15. The property of a succession is the common pledge of the creditors, except so far as privileges have been lawfully acquired. *Succession of Harkins*, 923.

See PRESCRIPTION, 19, 32.

IV. *Administrators and Curators.*

16. Where there are several applicants for the curatorship of a vacant succession, which exceeds three thousand dollars in value, the judge is bound to appoint two of them, provided they have the requisite qualifications. C. C. 1116, 1117. There is no difference as to the rights of applicants for the curatorship, founded on the amount of their claims. *Succession of Nicolas*, 97.

17. In appointing a curator to a vacant succession, creditors must be preferred to those who are not. C. C. 1114. *Ib.*

18. In the appointment of an administrator, the beneficiary heir, of age, and present in the State, must be preferred to every other person. C. C. 1035. Where there is but one beneficiary heir, this right of preference entitles him to the exclusive administration of the succession. *Succession of Briscoe*, 268.

19. An administrator is responsible personally for any loss sustained by the succession, from the want, on his part, of that degree of care which a prudent father of a family uses in the management of his own affairs. *Succession of Noblet*, 281.

20. An administrator may be appointed, though the property of the succession has been sold, and a part of the heirs are of age and have accepted unconditionally. For such of the heirs as were minors the succession could only be accepted with benefit of inventory; and in such cases the Civil Code expressly authorises the appointment of an administrator to manage the succession until a partition is made. C. C. 1040. *Dees* v. *Tilden*, 412.

21. In an action against an administrator, by one entitled to be paid out of the proceeds of property sold at a probate sale by a former administrator, for the price of which notes were given, and one of which fell due before the appointment of the defendant, the latter will be presumed, after the notes have become due, and in the absence of evidence to the contrary, to have

received the proceeds of the sale; and if any part was received by the first administrator, it is incumbent on his successor to show that he was unable to compel the former to account and pay over the amount so received; this fact is a matter of special defence, which it is for the defendant to prove. *Gas Bank* v. *Webb*, 526.

22. The validity of a decree appointing a curatrix of a vacant succession, cannot be enquired into collaterally. *Hogan* v. *Thompson*, 538.

23. The powers and rights of an administrator under the common law, are not the same as in this State. By the common law he has the same property in the goods and chattels of the deceased as the latter had when living; he may, without a decree of court, sell the assets, and convert them into money for the payment of debts; and to effect a sale made by him, so as to let in the claim of the heir, some fraud, collusion, or misconduct between the parties, must be shown. *Morrill* v. *Carr*, 807.

24. An administrator is the trustee of the creditors; his first duty is to them; he is bound to watch over their interests. *Succession of Harkins*, 923.

See APPEAL, 25. COURTS, 7. TUTORSHIP, 14.

V. *Sale of Effects.*

25. No period is fixed by law within which the property of a succession, offered for sale at the suit of a creditor, must be appraised. *Johnson* v. *Hamilton*, 206.

26. The stat. of 15 March, 1830, s. 1, merely makes lawful certain sales of the property of successions made by auctioneers. It does not purport to interfere with the power of courts to direct such property to be sold by their officers. Under the new organisation of the judiciary and of the office of sheriff, by the constitution of 1845, such sales should be made by the sheriff. *Succession of Nora*, 229.

27. Where community property has been adjudicated to a surviving spouse, and a mortgage retained to secure the price, the administratrix of the deceased spouse cannot seize and sell the property so adjudicated, until the portion of the survivor has been ascertained by a partition and settlement of the community, but upon proof of the existence of debts, and of her having exhausted, by a proper application of them, the funds placed at her disposal for their payment. *Sanders* v. *Carson*, 393.

28. In an action by an administratrix against the purchaser, for the price of property of the succession sold *per aversionem*, proof of an agreement by the administratrix and the heirs of age to make a deduction from the price in proportion to an alleged deficiency in the quantity, is inadmissible. *Per Curiam:* The sale being *per aversionem*, the administratrix could make no such agreement in her representative capacity; nor could the heirs of full age affect the interests of the minors by such a contract. Any agreement by these parties, would be an obligation personal to themselves. *Dees* v. *Tilden*, 412.

29. In an action for the price of property purchased at the sale of a succession, evidence on the part of the purchaser of payments by him of debts of the succession, is inadmissible. *Per Curiam:* Those debts could only be paid in the due course of administration, by authority of the judge, and constitute no offset against the plaintiff's demand. C. C. 1056. *Ib.*

30. A judgment ordering the sale of the property of a succession, rendered at the suit of the curator, without the appointment of an attorney to represent the absent heirs, is not a nullity. *Per Curiam:* The curator represented the succession, and had the capacity to provoke a sale of its property. The stat. of 22 February, 1817, making it his duty to prove, contradictorily with the attorney of absent heirs, that the sale was advantageous or necessary, is merely directory; it contains no prohibitory clause; and although its non-observance may, in certain cases, subject the curator to damages at the suit of the absent heirs, it is one of those informalities anterior to judgment, which cannot be enquired into collaterally. *Gibson* v. *Foster*, 503.

31. It is the duty of the curatrix of a vacant succession to sell the moveable effects belonging to it at once, whether there be any debts due by the succession or not. *Hogan* v. *Thompson*, 538.

32. The compensation due to a parish judge for the sale of property belonging to a succession though opened in another parish, is that fixed by sec. 5 of the stat. of 28 March, 1813. He is not entitled to the commission allowed to ordinary auctioneers on sales made by them. *Succession of Girod*, 595.

33. The deliberations of creditors touching the sale of the property of an insolvent succession must, in all cases, be homologated, or the sale will be null. *Neda* v. *Fontenot*, 782.

34. Clerks of courts have no power to homologate the deliberations of creditors touching the sale of the property of insolvent successions. Const. art. 79. Stat. 29 May, 1846. The homologation is a judicial act. *Ib.*

35. Where the mortgage creditors of an insolvent succession have declared their wish to exercise the right of requiring that so much of the property should be sold for cash as may be necessary to satisfy their

claims, they should not be considered, in counting the votes, to ascertain the wish of the majority of the creditors in number and amount, as to the terms of sale of the residue of the property. *Neda* v. *Fontenot*, 782.

36. Where an administrator, charged with the sale of the property of a succession, acts at the sale as the agent of one who purchases a large portion of the property, the sale will be null. It will make no difference that he did not act from improper motives. C. C. 19. *Ib.*

37. The fact that property belonging to a succession was purchased at the probate sale by an agent of the administrator, and afterwards transferred to him, will not entitle the heirs to recover the property against a third person, a purchaser from the administrator, in good faith, without notice. *Morrill* v. *Carr*, 807.

38. Where a surviving husband, to whom, after the death of the wife, the community property had been adjudicated, executes a mortgage in favor of the minor children of the marriage, on the real property thus adjudicated, but afterwards sells it and dies without having settled his wife's succession, or satisfied the claim of the minors, who accept his succession with benefit of inventory, the minors cannot require payment of any portion of their claims from the last purchaser until the successions of the husband and wife are finally settled. The husband is the warrantor of the purchaser; and it is only in case of his succession being insufficient to pay the claim of the minors, that the purchaser can be made liable for the deficiency. *Vascocu* v. *Smith*, 828.

39. In the absence of proof to the contrary, it will be presumed that an order directing a sheriff to sell property of a succession, was regularly issued. *Succession of Wadsworth*, 966.

40. A probate sale will not be set aside, at the instance of the administratrix, on the ground that the description of the property in the advertisement of sale was not a full one, where there is no reason to believe that any injury resulted from the defective description, and the creditors of the succession do not complain. *Ib.*

41. A probate sale of the property of a succession to which there were no minor heirs, ordered to be made on credit, on the application of the administratrix, for the purpose of paying debts, and not shown to have been made for less than the actual value of the property at the time, will not be set aside on the technial ground that the sale could not be legally made for less than the amount at which the property was appraised in the inventory. *Ib.*

42. An order for the sale of the property of a succession, made at the suit of an administratrix, without citing the attorney of absent heirs, is not a nullity. Nor will the administratrix be permitted to question the validity of such a sale, made in execution of a decree of a court of competent jurisdiction, provoked by herself, and not appealed from, where the purchaser is satisfied, and the heirs, who alone could have a right to complain, are silent. The administratrix, representing the succession, was authorised to provoke the sale of the property. The omission to cite the attorney of absent heirs was an informality anterior to judgment which could not be enquired into collaterally, though it might subject the administratrix to damages at the suit of the absent heirs. *Per Curiam:* The provisions of the Civil Code, arts. 1042, 1157, are, so far as regards the point under consideration, substantially the same with those of the stat. of 22 February, 1817. *Ib.*

See COMPENSATION, 4. COURTS, 2.

SUMMARY PROCEEDINGS.

Where the property of one against whom a judgment has been rendered appears to be subject to privileges or mortgages, the judgment creditor, as incidental to the right of having the property sold for the payment of his debt, may call upon the creditor claiming such privileges or mortgages in preference over his debt, by a rule, to show cause why they should not be erased; and to this rule the creditors are bound to plead, and if a sufficient reason be not alleged for not doing so, the court may order the privileges or mortgages to be erased to enable the sale to be effected. The pendency of a suit in which his debt, mortgage, or privilege is involved would be a good plea, and would arrest the distribution. Litigations concerning such privileges or mortgages are not required to be cumulated with the proceeding by rule, nor is the right to a trial by jury to be taken from a party entitled to it, nor that of having his rights as a creditor tested before any other competent tribunal. *Per Curiam:* The object is to compel the creditor claiming an apparent charge upon the property subject to execution to vindicate his right to determine the validity of his claim by suit, but not to oblige him to litigate it in the action in which he is called upon to answer, if he have a right to proceed in another form or before another tribunal. *Bank of Louisiana* v. *Delery—Re-hearing*, 650.

See ATTACHMENT, 13, 14. SALE, 61. SEQUESTRATION, 2,

SURETY.

1. Plaintiff, in consideration of being employed as a factor to sell the crop of his

principal for a commission, became surety for the latter in a bond executed in certain judicial proceedings. The friendly relations of the parties having been interrupted through the fault of defendant, plaintiff notified the latter of his desire to terminate his agency, and to have another surety substituted in his place, informing him that unless such substitution was made before a certain time, he would charge a commission on the amount of the bond on which he was bound as surety. In an action to recover the commission claimed, no other surety having been substituted: *Held*, that plaintiff had no right to insist upon being released from his suretyship, and that, whatever claim he may have resulting from the agreement as to the sale of the crop, defendant was not bound to compensate him for not releasing him. *Conrey* v. *Brandegee*, 132.

2. The condition of a surety cannot be more onerous than that of the principal. The surety may avail himself of every defence which his principal could have used, and may plead any prescription by which the creditor's demand has been extinguished. C. C. 3006, 3029. *Gilbert* v. *Meriam*, 160.

3. It is not necessary, to enable a lessor to preserve her recourse against the surety of her lessee, that she should enforce her privilege against the lessee himself. It is enough that she has done no act to destroy or impair the privilege, or which could have prevented her, at any moment, from subrogating the surety to all her rights. *Per Curiam:* A surety is not discharged by the mere omission of the creditor to enforce or preserve a privilege. C. C. 3030. *Parker* v. *Alexander*, 188.

4. Where a defendant dies pending a suspensive appeal taken by him from a judgment in favor of plaintiff for a community debt, and his widow is appointed administratrix of his succession and accepts the community, but is not made a party to the appeal except as tutrix of her minor children, and the judgment below is affirmed in general terms without any reference to the parties, the judgment will be binding only on the minors, and have no effect against the community represented by the administratrix, nor against her personally; and the surety having signed the appeal bond when there was a judgment against the original defendant binding the community, the failure of the creditor, on the death of the principal debtor, to make the proper parties, so as to maintain the judgment in its integrity, and to enable him to subrogate the surety to all his rights under it, will destroy his recourse against the surety *pro tanto*. Nor will it make any difference in such a case that an execution on the judgment so affirmed, was afterwards issued against the widow, with her consent, for the balance remaining due after exhausting the property of the heirs, and that all that then could be made out of her property was received under it, where there is no evidence affording any ground for believing that any part of the debt would have been lost, had the original judgment been maintained on the appeal against the community. *Per Curiam:* The execution issued against the widow without any judgment against her, must be considered as illegally issued; and the surety is only bound by legal proceedings against the debtor. *Saulet* v. *Trepagnier*, 427.

5. A surety is entitled to the benefit of all the securities in the hands of the creditor; and if any of them be lost by his wilful neglect or want of due diligence, the surety is, to that extent, discharged. *Ib.*

6. Art. 3030 of the Civil Code which declares that "the surety is discharged, when, by the *act* of the creditor, subrogation to his rights, mortgages and privileges, can no longer be operated in favor of the surety", must be understood as comprehending under the word *act* the omissions or neglects of the creditor. *Ib.*

7. Where in an action on a contract made with the commissioners of a particular district or subdivision of the parish, acting under an ordinance of the police jury, for the erection of certain levées, the evidence shows that the contractor did not contemplate that the parish should be responsible in the first instance for the cost of the levées; and the failure to obtain payment from the source originally contemplated is attributable to the negligence of the creditor, the latter cannot recover. *Slattery* v. *Police Jury*, 444.

8. Where a deed of trust has been executed in another State for the purpose of protecting the surety against any loss in consequence of his suretyship, the latter, if legally liable, is not bound to wait until he has actually paid as surety, before he can require the trust fund to be applied to the payment of the principal obligation, so as to effect his release. And where the principal has died, and the liability of the surety is contested, the trust fund may be withheld from distribution, for a reasonable time, until it can be ascertained whether the surety will be liable or not. C. C. 3026. *Succession of Montgomery*, 469.

9. Where an auctioneer, who had received and advertised for sale certain goods, sells them after his term of office has expired, and converts the proceeds to his own use, the sureties on his official bond, who bound themselves "that he should perform his duty as an auctioneer to all persons who shall employ him as such, during his continuance in office", will not be liable for the amount so converted. *Florance* v. *Richardson*, 663.

10. A surety, who has bound himself *in solido* with his principal, cannot require the property of the latter to be discussed before recourse is had against him (C. C. 2089, 3014); nor, though the debt be secured by a mortgage on the property of the principal, can the surety compel the creditor to resort to his mortgage before calling upon him. *New Orleans Canal and Banking Company* v. *Escoffie*, 830.

11. Where a creditor of a partnership, for the payment of whose debts a third person had bound himself as surety, takes from the partners a note payable at a future day in settlement of a debt due him by open account, the prolongation of the term of payment will discharge the surety. C. C. 3032. *Lee* v. *Sewall*, 940.

12. A surety on a twelve months' bond is not subrogated, on paying it, to an equivalent portion of the judgment under which the property for which the bond was given was adjudicated, but only to the rights of the creditor of the bond itself. *Per Curiam:* The debt created by the judgment is not the same as that represented by the bond. The surety who pays the bond has none of the rights of mortgage which the judgment itself imports. *Trent* v. *Calderwood*, 942.

13. One who signed an appeal bond as surety for a third person, in consequence of an obligation contracted by defendant to save him harmless, may recover from the latter a fee paid by him to counsel to defend him in an action on the appeal bond; and where defendant was notified by the surety of the name of the counsel so employed by him, and no objection was made thereto, such silence will be an implied approval of his employment. *Berry* v. *Slocomb*, 993.

See Appeal, 38, 39. Bail. Bills of Exchange, &c. 12, 15. Sale, 54. Sequestration, 1.

TAX.

1. Art. 127 of the constitution applies to state, and not to municipal taxes. *Second Municipality* v. *Duncan*, 182.

2. The laws requiring levées to be made on lands lying on the Mississippi river, are not laws imposing a tax within the meaning of the third section of the act of Congress of 20 February, 1811, exempting lands sold by Congress from any tax imposed under the authority of the state government, for five years from the date of the sale. *Cowley* v. *Copley*, 329.

3. To authorise the collection of the special tax, imposed on certain lands subject to inundation in the parish of Rapides, by the statute of February, 1845, the tax must be imposed at a certain rate upon the assessed value of the inundated lands, the statute authorising no other basis. And where an assessment was made by two assessors appointed by the police jury, but never advertised, and plaintiffs offer no proof that any notice of the assessment, or of the proceedings in relation to it, was ever given to the owners of the land on which the tax was imposed, the tax cannot be recovered. The assessment roll and the report of the assessors are proof only of the facts that they were made as they appear to be; they are not evidence of notice to the party assessed, nor of any other fact at issue between the parties. *Police Jury* v. *Huie*, 887.

See Appeal, 60. Corporation, 3. New Orleans, 1 to 4, 7, 8.

TENDER.

See Payment, IV.

TESTAMENT.

See Donation and Testament, II.

TUTORSHIP.

I. *Family Meeting.*

1. A family meeting must be composed of five relations, or, in default of relations, of five friends of the minor. C. C. 305. The under-tutor cannot be a member of a family meeting, though he must be present for the purpose of advising. C. C. 302. *Tutorship of Bates*, 941.

II. *Appointment of Tutor.*

2. An order appointing a tutor provisionally, but reserving to the court the right of determining the legality of the appointment whenever the question may be brought before the court, can confer no authority. Provisional tutors are unknown to the law. *Fisk* v. *Fisk*, 71.

3. An appointment by the court is necessary, even when the tutorship is applied for by the father. C. P. 949. He must be appointed like any other person. *Ib.*

4. Art. 946 of the Code of Practice, which provides that "where the father and mother of a minor reside out of the State, and are not represented in it, and the minor is also absent, he may be provided with a tutor or curator by the judge of probates of the place where he has interests to assert or defend," is an exception to the general rule prescribed by art. 944, that the ap-

pointment belongs to the judge of probates of the domicil or usual residence of the father and mother, if either be living. The object of art. 946 was to authorize the appointment of a tutor *ad bona*, to take charge of the minor's property in this State. A tutor appointed under its provisions cannot remove the minor's property out of the State. A tutor so appointed holds a civil office to endure as long as the minority lasts, or until he is legally superseded, and binds him to account to the domestic judge at the expiration of the tutorship. C. C. 350. *Ib.*

5. The statute of 1 April, 1843, recognises as valid and binding upon the courts of this State, appointments of tutors or guardians of minors residing out of the State, made at the place of the minor's domicil, if within the United States; and, under the second section of that act, any such foreign tutor or guardian may, at any time, on making a proper showing, compel a tutor *ad bona* appointed here to account to him, and may remove the minor's property out of this State, upon proof of his authority to do so under the laws of the minor's domicil. *Ib.*

6. Where a father resides in this State, he will, though a foreigner, become of right the tutor of his children, on the death of their mother, and a legal mortgage will attach, in favor of his minor children, on real property owned by him here. *Succession of Guillemin*, 634.

III. *Right to.*

7. A great-grandmother cannot be tutrix of her great-grandchild. Women, except the mother and grandmother, are excluded from the tutorship. *Auguste* v. *Trudeau*, 623.

8. A foreigner residing in the State may be appointed a tutor by our courts. *Succession of Guillemin*, 634.

See 25 *infrà*. FATHER AND CHILD, 1.

IV. *Rights and Obligations of Tutor and Under-Tutor.*

9. Where a tutor acknowledges, in an authentic act, the receipt of the amount of notes due to his minor, which were secured by mortgage, and releases the mortgage, the acknowledgement is evidence, so far as third persons are concerned, of the extinguishment of the debt, and, as to them, the release of the mortgage will be valid, though the amount of the notes was never paid, or paid only in part, to the tutor. But parties or privies to the pacts in which the release originated, cannot take advantage of their own wrong, to the injury of the minors. *Kemp* v. *Rowley*, 316.

10. Where a tutor releases a mortgage held by minors on a plantation and slaves, in a case where the annual interest of the debt was more than sufficient for their wants, and there were no debts to pay, the release being made fraudulently to enable the debtor to effect a loan on the property, and the tutor receives in payment of the minors' claims depreciated bank notes, the debtor will not be allowed, in the absence of proof that the notes or their proceeds actually inured to the benefit of the minors, credit even for the actual value of the notes paid to the tutor. The release of the mortgage is a fraud on the rights of the minors, which none of the parties or privies thereto will be permitted to take advantage of. *Ib.*

11. The husband of a married woman is bound with her, *in solido*, for her acts as a tutrix. *Beard* v. *Morancy*, 347.

12. Defendant, natural tutrix of her minor children, being about to contract a second marriage, applied to a family-meeting to determine whether she should retain the tutorship, which decided that she should do so, on condition of her executing, prior to her marriage, a bond to the parish judge in a certain sum to secure the rights of the minors, and on that condition only. Having married without executing the bond, the under-tutor instituted a suit for her destitution, to which she answered objecting to the right of the family meeting to require a bond and to the form of the bond required, but alleging her readiness, with her husband, to give security, if required by law. *Held*, that defendant should be retained as tutrix on giving bond and surety, *in solido*, with her husband, for the faithful performance of her duties as tutrix. *Smith* v. *Dickerson*, 401.

13. Where, at the time of appointing a tutor, the property of the minor consisted in an undivided interest in a plantation and slaves, but, by a compromise afterwards made with the co-proprietors, the tutor is authorised to receive a sum of money in cash in extinguishment of the undivided interest of the minor, the tutor, though appointed by the advice of a family-meeting and expressly exonerated from giving security under the provision of the stat. of 10 March, 1834, sec. 4, may be required, in consequence of the change in the character of the property, to give security for the sum to be received by him, and the interest which may accrue thereon. Arts. 330, 331, 332 of the Civil Code are not repealed by the stat. of 10 March, 1834, sec. 4. *Course* v. *Forshey*, 402.

14. Where all the heirs of a succession are minors, their tutor may, as such, administer the succession, and sue for the sale of the property. The decree for the sale will be binding upon the heirs and creditors.

Per Curiam: By the dispositions of the Civil Code, when the heirs claimed time to deliberate, an administrator was to be appointed in all cases; and when the succession was afterwards accepted with benefit of inventory, the administrator was to continue in his functions, and to settle the succession. But the Code of Practice, subsequently adopted, provides that an administrator shall be appointed in such cases, if any of the creditors of the succession require it; and this we take to be the rule now in force, as being the last expression of legislative will. C. P. 976. *Bryan* v. *Atchison*, 462.

15. Where a mother, who had forfeited the natural tutorship of her children by marrying a second time without having been legally authorised to retain it, after the death of a tutor appointed in her place and of her second husband, is re-appointed tutrix by the advice of the family-meeting, she will not be bound to give bond. The rule exempting the father or mother from giving security before acting as tutor or tutrix, is a general one, to which an appointment under such circumstances forms no exception. *Per Curiam:* Under art. 950 of the Code of Practice, the judge might have appointed her tutrix without the advice of a family meeting; the submission of her application to such a meeting, and its decree declaring her worthy of the trust, can impose no additional burthens on her. *Molinari* v. *Fernandez*, 553.

16. Where the under-tutor of a minor intervenes in an action by the holder against the maker of a note, secured by mortgage, payable to the tutor, alleging that the transfer of the note by the tutor was illegal, not having been made for money, nor for any thing which inured to the benefit of the minor, and that, though the minor is still subject to the tutorship, the interests of the tutor, as transferror of the note, are adverse to the minors, no execution will be allowed to issue for the amount due to the minor. *Per Curiam:* The tutor not being a party to the suit cannot be removed, and he ought not to be permitted to receive the amount; nor ought it to be paid to the under-tutor, who instituted the intervention. *McMasters* v. *Dunbar*, 577.

17. It is the duty of a tutor, immediately after appointment, to reduce the property of his wards into possession, to render it productive, and to administer it as a prudent father of a family administers his own affairs. *Succession of Guillemin*, 634.

18. In settling the accounts of a tutor he will not be allowed to make a donation to his wards, at the expense of his creditors. *Ib.*

19. Where the legal mortgage existing in favor of a minor on the property of his tutor has been released by a decree of court, on the substitution of a special mortgage in his favor, in conformity with the provisions of the stat. of 11 March, 1830, the court cannot afterwards, on the depreciation of the property specially mortgaged, set aside its own final decree, and reinstate the legal mortgage. *Union Bank* v. *Erwin*, 657.

20. It is not necessary that the stat. of 11 March, 1830, relative to the giving of special mortgages to secure the rights of minors, should be read to the under-tutor and members of a family-meeting, convoked, at the instance of the tutor, for the purpose of advising as to the propriety of selling the interest of the minor in property belonging to himself as surviving partner of the community, and to his children. *Succession of Chew*, 930.

21. Where the tutor of a minor receives and sues on notes taken at a probate sale for the price of property inherited by the latter, he cannot question the authority of the judge to receive such notes. *Grayson* v. *Mayo*, 927.

22. Where a tutrix is deprived of the tutorship by marrying a second time without having convened a family meeting to decide whether she shall remain tutrix, the appointment of under-tutor does not cease with that of the tutrix. It is, under such circumstances, the duty of the under-tutor to provoke the appointment of a tutor. C. C. 303. *Tutorship of Bates*, 941.

See BILLS OF EXCHANGE, &c. 7, 8. EVIDENCE, 36. PRESCRIPTION, 12.

V. *Termination.*

23. Conduct notoriously bad will authorise the removal of a mother from the tutorship of her children; and the neglect and refusal of the under-tutor to take any measures for her removal, is a sufficient cause for his removal. *Daigre* v. *Daigre*, 333.

24. Art. 368 of the Civil Code, which authorises a husband, though a minor, to appear in court in all cases, is an innovation on the former laws on the subject, and forms an exception to the dispositions of arts. 376, 377, 1235, and 1236 of that Code; and these articles now apply only to cases of ordinary emancipation. A similar power is conferred upon the wife who is under age, provided she be authorised by her husband, by sec. 12 of the stat. of 25 March, 1828, amending art. 999 of the Code of Practice. *Molinari* v. *Fernandez*, 553.

25. Notoriously bad conduct, or unfaithfulness in the administration of the property of the minors, are the only causes for which a father can be legally excluded, or removed, from the tutorship of his children. C. C. 326. Proof that a father is improvident, careless in pecuniary matters, and wanting

in habits of industry, or that he had not caused an inventory to be made, where the delay resulted from no indisposition on his part to take the necessary steps to protect the interests of the minors, are not sufficient to warrant his removal from the tutorship. *Segura* v. *Prados*, 751.

USUFRUCT.

See DONATIONS, &c. 10, 24. SERVITUDE, 1, 8.

VENUE.

See CRIMINAL LAW, III. NEW TRIAL, 13.

WARRANTY.

See SALE, V.

END OF VOLUME II.

ERRATA.

Page 18, line 2, from top, for *on* substitute *in*.
——————— dele the *comma* after *non-resident*.
76, —— 15 from bottom, for *Civil Code* substitute *Code of Practice*.
109, —— 12 from top, for 51 —— 52.
112, —— 29 ——— " 61 —— 52.
130, —— 3 ——— " *charted* —— *chartered*.
135, —— 6 ——— " *Gruy* —— *Guidonis*.
168, —— 19 from bottom, for 1942 —— 1952.
176, —— 22 ——— " *plaintiffs* —— *plaintiff*.
190, —— 7 ——— " *defendant* —— *defendants*.
220, —— 17 ——— " *on* —— *in*.
299, —— 7 ——— " 13 —— 15.
306, —— 2 ——— " *attained* —— *obtained*.
316, —— 26 ——— " *Rowly* —— *Rowley*.
318, —— 10 ——— " *reason* —— *reasoning*.
352, —— 13 from top, " 353 —— 351.
——— —— 19 ——— " 353 —— 351.
370, —— 8 ——— " 7 —— 17.
399, —— 9 from bottom after *proof* insert *of*.
557, page numbered 567 by mistake.
——, line 17 from bottom, for 22d substitute 12th.
717, —— 5 ——— " *Lovelase* —— *Lovelace*.
747, —— 12 ——— " 2242 —— 2442.
772, —— 23 from top, after *not* insert *against*.
797, in top line, for *his* substitute *her*.
808, line 9 from bottom, for *then* substitute *than*.
827, —— 5 from top, after *being* insert *a*.
875, —— 4 from bottom, for p. 46 substitute p. 44.
898, —— 20 ——— " 420 ——— 430.
993, —— 14 ——— " *indemnify to* substitute *to indemnify*.
1012, —— 15 from top, after *production* insert *of*.